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EXPLAINING THE
RISE, PROGRESS, AND PRESENT STATE,

OF THE

ENGLISH LAW;

J. H. Harris Jun.

DEFINING AND INTERPRETING

THE TERMS OR WORDS OF ART;

AND

Comprising Copious Information on the Subjects

OF

LAW, TRADE, AND GOVERNMENT.

ORIGINALLY COMPILED BY

GILES JACOB:

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BY T. E. TOMLINS,

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A MODERN LAW DICTIONARY,

CONTAINING

THE PRESENT STATE OF THE LAW

IN THEORY AND PRACTICE;

WITH

A DEFINITION OF ITS TERMS, AND THE HISTORY OF ITS
RISE AND PROGRESS.

P.

PAAGE, *paagium*, The same with *passagium*. *Mat. Paris* 767: See *Passagium*.

PACIBILIS, Payable or passable. *Ex Regis. Grenefeld. Archiep. Ebor. MS.*

PACARE, To pay; as *tolnetum pacare*, is to pay toll, *Mon. Angl. tom. 1. pag. 384.* Hence *pacatio*, payment, *Mat. Paris, sub. an. 1248.*

PACE, *passus*.] A step in going, containing two feet and an half, the distance from the heel of the hinder foot to the toe of the fore-foot; and there is a Pace of five foot, which contains two steps, a thousand whereof makes a mile; but this is called *passus major*.

PACEATUR. *et recipiet Agentrida corium ejus, & carnem, & Paceatur de cetero*, i. e. Let him be free, or discharged, for the time to come. *Ll. Inæ. c. 45.*

PACIFICATION, *pacificatio*.] A peace-making, quieting, or appeasing; relating to the wars between *England* and *Scotland*, anno 1638, mentioned in the statute 17 *Car. 1. c. 17.*

PACK of WOOL, A horse-load, which consists of seventeen stone and two pounds, or 240 pounds weight. *Merch. Dict.: Fleta. lib. 2. c. 12.*

PACKAGE and **SCAVAGE**, Antient duties, payable on merchandise to the city of London. See *Scavage*.

PACKERS, Persons appointed, and sworn duly, to pack herrings. See title *Herrings*.

PACKETS, Packet vessels, prohibited from exporting or importing goods. *Stat. 13 & 14 Car. 2. c. 11. § 22.* See title *Customs*.

PACKING WHITES, A kind of cloth so called, mentioned in *stat. 1 R. 3. c. 8.*

PACT, Fr.] A contract or agreement. *Law French Dictionary.*

PAGUS, A county: *Alfred Rex Anglo-Saxonum natus est in Villa Regia quæ dicitur Wantage in illa paga quæ nominatur Berksh. &c.*

PAIN, or **PEINE**, **FORT ET DURE**, Fr.—Lat. *pæna fortis &*

dura.] A special punishment heretofore inflicted on those who, being arraigned of felony, refused to put themselves on the ordinary trial, but stubbornly stood mute; vulgarly called *Pressing to Death*. See title *Mute*.

PAINS and PENALTIES. Acts of parliament to attaint particular persons of treason or felony, or to inflict Pains and Penalties, beyond or contrary to the Common Law, to serve a special purpose, are to all intents and purposes new laws, made *pro re nata*, and by no means an execution of such as are already in being. 4 *Comm. c.* 19. § 1. See title *Attainder*.

PAIS, A county or region, *pagus; g, in i vel y converso. Spelm.* Trial *per pais*, by the country, *i. e.* a Jury.

PAISSO, Pasnage, or liberty for hogs to run in forests or woods to feed on mast. *Mon. Angl. i.* 682. See *Passune*.

PALACES. The limits of the Palace of Westminster, *stat. 28 Hen. 8. c.* 12. See *Marshal; Murder; Striking*.

PALAGIUM, A duty to lords of manors, for exporting and importing vessels of wine in any of their ports.

PALATINE, County; See *County*.

PALFREY, *Palfredus, palafredus, falefredus, palifredus.*] One of the better sorts of horses used by noblemen or others for State: and sometimes of old taken for a horse fit for a woman to ride. *Camden* says, that *William Fauconbergh* held the manor of *Cukeny*, in the county of *Nottingham* in serjeanty, by the service of shoeing the King's Palfrey, when the King should come to *Mansfield*. See 1 *Inst.* 149.

PALICEA, A park pale. *Cowell*.

PALINGMAN, mentioned in *stats. 22 Ed. 4. c.* 23: 11 *H. 7. c.* 23; seems to be a merchant denizen, one born within the *English* pale. But *Skinner* judges it to signify a fishmonger, or merchant of fish. *Cowell*.

PALLA, A canopy; also often used for an altar-cloth. *Matt. Paris, sub ann.* 1236.

PALLIO COOPERIRE. It was antiently a custom where children were born out of wedlock, and their parents afterwards intermarried, that those children, together with the father and mother, stood under a cloth extended while the marriage was solemnizing, which was in the nature of adoption; and by such custom the children were taken to be legitimate. *Epist. Rob. Grosthead Episc. Lincoln.* Such children, however, were never legitimate in this country at Common Law, though the clergy wanted to have a law pass to render them legitimate. See *Bastard*.

PALL; PALLIUM, The pontifical vesture made of lamb's wool, in breadth not exceeding three fingers cut round that it may cover the shoulders; it has two labels or strings on each side, before and behind, and likewise four purple crosses on the right and left, fastened with pins of gold, whose heads are *Sapphire*: these vestments the Pope gives or sends to archbishops and metropolitans, and upon extraordinary occasions to other bishops; who wear them about their necks at the altar, above their other ornaments. The Pall was first given to the bishop of *Ostia* by Pope *Marcus* the Second, *anno* 336.

Durandus, in his *Rationale*, tells us that it is made after the following manner, *viz.* The nuns of *St. Agnes* every year, on the feast day of their saint, offer two white lambs on the altar of their church,

during the time they sing *Agnus Dei* in a solemn mass; which lambs are afterwards taken by two of the canons of the *Lateran* church, and by them given to the Pope's subdeacons, who put them to pasture till shearing time, and then they are shorn, and the pall is made of their wool, mixed with other white wool; the Pall being thus made is carried to the *Lateran* church, and there placed on the high altar by the deacons of that church on the bodies of St. *Peter* and St. *Paul*; and after the usual watching, it is carried away in the night, and delivered to the subdeacons who lay it up safe. *Selden's Hist. Tithes*, 227. See also *Cressy's Church Hist.* 972.

PALMISTRY, A kind of divination, practised by looking upon the lines and marks of the hands and fingers; being a deceitful art used by *Egyptians*, prohibited by *stat. 1 & 2 P. & M. c. 4*. See title *Egyptians*.

PAMPHLETS, Of a certain size, are among the articles liable to a stamp duty.

PANDECTS, The books of the Civil Law, compiled by *Justinian*. See title *Civil Law*.

PANDOXATRIX, An ale-wife, who both brews and sells ale or beer; from *pandoxatorium*, a brewhouse, *Statut. & consuetud. burgi ville de Montgom. temp. Hen. 2*.

PANEL, [*panella, panellum*.] According to Sir *Edward Coke*, denotes a little part; but *Spelman* says, that it signifies *schedula vel pagina*, a schedule or page; as a Panel of parchment, or a counterpane of an indenture; but it is used more particularly for a schedule or roll, containing the names of such jurors as the sheriff returns to pass upon any trial. *Kitch. 226: Reg. Orig. 223*. And the impaneling a jury is the entering their names by the sheriff into a Panel or little schedule of parchment; in *panello assisa*. *Stat. 8 H. 6. c. 12*. See titles *Jury*; *Trial*.

PANES DE MANDATO; See *Mandato*.

PANETIA, A pantry, or place to set up cold victuals. *Cowell*.

PANIS ARMIGERORUM, The bread distributed to servants. *Mon. Angl. i. 240*.

PANIS BISUS, Coarse bread. *Mon. Angl. i. 240*.

PANIS BLACKWHYTLOF, Bread of a middle sort, between white and brown, such as in *Kent* is called *Ravel-bread*. In religious houses it was their coarser bread made for ordinary guests, and distinguished from their household loaf, or *Panis conventualis*, which was pure manchet, or white bread. *Cowell*.

PANIS MILITARIS, Hard biscuit, brown George, camp bread, coarse and black. The prior and convent of *Ely* grant to *John Grove*, a corody or allowance,—*Ad suum victum quolibet die unum panem monachalem, i. e. a white loaf*; and to his servant *unum panem nigrum militare, i. e. a little brown loaf or biscuit*. *Cartular. Ely. MS. f. 47*.

PANNAGE, or **PAWNAGE**, [*pannagium* Fr. *Pasnage*.] That food which the swine feed upon in the woods, as mast of beech, acorns, &c. Also it is the money taken by the *Agistors* for the food of hogs in the King's forest. *Cromp. Jurisd. 155. Stat. West. 2. 13 E. 1. st. 1. c. 25*. *Manwood* says *pannage* signifies most properly the mast of the woods or hedge rows. And see *Linwood*. It is mentioned in the statute 20 *Car. 2. c. 3*. And in antient charters this word is variously written; as *pannagium, pasnagium, pathnagium, paunagium & pessona*. See 8 *Reft. 47*.

PANNUS, A garment made with skins. *Fleta, lib. 2. cap. 14.*

PANTILES, Are among the articles liable to certain duties of excise.

PAPER. The duties on this article form a very productive branch of the public revenue, and are under the survey of the Commissioners of *Excise*. See that title, and titles *Customs; Books, &c.*

PAPER-BOOKS, The issues in actions, &c. upon special pleadings, made up by the clerk of the Papers, who is an officer for that purpose. Upon an issue in law, it is termed the *Demurrer-book*. The clerks of the Papers of the court of King's Bench, in all copies of pleas and Paper-books by them made up, shall subscribe to such paper-books, the names of the counsel who have signed such pleas, as well on the behalf of the plaintiff as defendant; and in all Paper-books delivered to the judges of the Court, the names of the counsel who did sign those pleas are to be subscribed to the books, by the clerks or attorneys who deliver the same. *R. Pasch. 18 Car. 2: 2 Lill. Abr. 268.* See titles *Issue; Practice; Pleading.*

PAPER-OFFICE, An antient office within the palace of *Whitehall*, wherein all the public Papers, writings, matters of state and council, letters, intelligences, negotiations of the King's minister's abroad, and generally all the Papers and despatches that pass through the offices of the two principal Secretaries of State, are lodged and transmitted, and there remain disposed in the way of library. There is also an office belonging to the Court of King's Bench so called. *Dict.*

PAPISTS,

PERSONS *professing the Popish religion*; otherwise distinguished by the denomination of ROMAN-CATHOLICS. The word *Papist* seems to be considered by the Roman-Catholics themselves as a nickname of reproach, originating in their maintaining the supreme ecclesiastical (and heretofore temporal) power of the *Pope, Papa*.—For this reason, probably, the word *Papist* is not to be found in the Index to a most valuable production by a gentleman of that persuasion: though in one of the notes on the work he has given perhaps a more clear and explicit summary of the law on this subject, than has any where else appeared; and which is therefore here introduced, corrected from some trifling errors, and modified so as to answer the present purpose. See 1 *Inst.* 391, *a.* in the *Notes*, and the word *Roman-Catholics* in the Index to the *Notes*. See also 4 *Comm. c. 4*, and Mr. *Christian's Notes there*.

As to papal provisions, and papal process, see this Dictionary, title *Præmunire*.

I. Of the Laws passed (in Great Britain) against Papists since the Reformation.

And herein,

1. *Of the Penalty on Papists for exercising their religious Worship; including the Laws respecting their Places of Education, and Ministers, or as they are usually termed Priests.*
2. *Of the Penalties for not conforming to the Established Church; and see this Dictionary, title Non-conformists.*
3. *Of the Penalties for refusing to take the Oath of Supremacy, and the Declaration against Popery.* [With respect to the not taking the Sacrament, and the Declaration against

Transubstantiation, see this Dictionary, title *Non-conformists*, as regards the Corporation and Test Acts.]

4. *Of the Laws affecting the Landed Property of Papists.*

II. *Of the Acts past (in Great Britain) in the present Reign (Geo. III.) to relieve the Papists.*

III. *Of the comparative Situations of Papists and Protestant Dissenters; and of the Disabilities to which the former are still liable in Great Britain.* [As relates to the Operation of the Corporation-Act and Test-Act, see title *Non-conformists*.]

IV. *The Acts passed in the Parliaments of Ireland for relief of Papists: in the course of the reign of George III.*

I. 1. By various statutes, if any *English* priest of the Church of *Rome*, born in the dominions of the Crown of *England*, came to *England* from beyond the seas, or tarried in *England* three days without conforming to the church, he was guilty of high treason; and they also incurred the guilt of high treason who were reconciled to the see of *Rome*, or procured others to be reconciled to it. By these laws also Papists were totally disabled from giving their children any education in their own religion. If they educated their children at home, for maintaining the school-master, if he did not repair to church, or was not allowed by the bishop of the diocese, they were liable to forfeit 10*l.* a month, and the schoolmaster was liable to forfeit 40*s.* a day; if they sent their children for education to any school of their persuasion abroad, they were liable to forfeit 100*l.* and the children so sent were disabled from inheriting, purchasing, or enjoying any lands, profits, goods, debts, duties, legacies, or sums of money.—Saying mass was punishable by a forfeiture of 200 marks: hearing it by a forfeiture of 100. See *stats.* 1 *Eliz.* c. 2: 23 *Eliz.* c. 1: 27 *Eliz.* c. 2: 29 *Eliz.* c. 6: 35 *Eliz.* c. 2: 2 *Jac.* 1. c. 4: 3 *Jac.* 1. cc. 4, 5: 7 *Jac.* 1. c. 6: 3 *Car.* 1. c. 2: 25 *Car.* 2. c. 2. 7 & 8 *W.* 3. c. 27: 1 *Geo.* 1. *st.* 2. c. 13.

By *stat.* 11 & 12 *W.* 3. c. 4, where the parents of Protestant children are Papists, the Lord Chancellor may take care of the education of such Protestant children, and make order for their maintenance suitable to the ability of the parent.

2. Under this head are to be classed those laws which are generally called the Statutes of Recusancy. It should be observed, that absence from church alone and unaccompanied by any other act, constitutes Recusancy, in the true sense of that word. Till the *stat.* 35 *Eliz.* c. 2, all Non-conformists were considered as Recusants, and were all equally subject to the penalties of Recusancy, that statute was the first penal statute made against Popish Recusants, by that name, and as distinguished from other Recusants. From that statute arose the distinction between *Protestant* and *Popish* Recusants; the former were subject to such statutes of Recusancy as preceded that of the 35th of *Elizabeth*, and to some statutes against Recusancy made subsequently to that time; but they were relieved from them all by the act of Toleration, *stat.* 1 *W. & M.* *st.* 1. c. 18. From the *stat.* 35 *Eliz.* c. 2, arose also the distinction between Papists or persons professing the Popish religion, in general, and Popish

Recusants, and Popish Recusants Convict. Notwithstanding the frequent mention, in the statutes, of Papists or persons professing the Popish religion, neither the statutes themselves, nor the cases adjudged upon them, present a clear notion of the acts or circumstances that, in the eye of the law, constituted a Papist, or a person professing the Popish religion. When a person of that description absented himself from church, he came under the legal description of a Popish Recusant; when he was convicted in a Court of law of absenting himself from church, he was termed a Popish Recusant Convict; to this must be added the constructive Recusancy, incurred by a refusal to take the Oath of Supremacy. With respect to the statutes against Recusancy; by these statutes Popish Recusants Convict were punishable by the censures of the church, and by a fine of 20*l.* for every month during which they absented themselves from church; they were disabled from holding offices or employments; from keeping arms in their houses; from maintaining actions or suits at law, or in equity: from being executors or guardians; from presenting to advowsons; from practising in the law or physic; and from holding offices civil or military; they were subject to the penalties attending excommunication; were not permitted to travel five miles from home, unless by licence, upon pain of forfeiting all their goods; and might not come to Court under pain of 100*l.* [No marriage or burial of such Recusant, or baptism of his child, should be had otherwise than by ministers of the church of *England*, under severe penalties imposed by *stat. 3 Jac. 1. c. 5.*] A married woman, when convicted of Recusancy, was liable to forfeit two thirds of her dower or jointure. She could not be executrix or administratrix to her husband, nor have any part of his goods; and during her marriage she might be kept in prison, unless her husband redeemed her at the rate of 10*l.* a month, or the third part of his lands; Popish Recusants Convict were, within three months after conviction, either to submit and renounce their religious opinions, or, if required by four justices, to abjure the realm; and if they did not depart, or if they returned without licence, they were guilty of felony, and were to suffer death as felons. See the statutes referred to under the former head; and, for the cases applicable to them, this Dictionary, title *Recusant*.

3. It must be premised, that the Roman-Catholics make no objection to take the Oath of Allegiance in *stat. 1 Geo. 1. st. 2. c. 13*; or the Oath of Abjuration in *stat. 6 Geo. 3. c. 53*.—With respect to the Oath of Supremacy by *stat. 1 Eliz. c. 1*. the persons therein mentioned were made compellable to take the Oath of Supremacy contained in that act: by *stat. 3 Jac. 1. c. 4*, another oath was prescribed to be taken, commonly called the Oath of Allegiance and Obedience; these oaths were abrogated by *stat. 1 W. & M. st. 1. c. 8*; and a new Oath of Allegiance and a new Oath of Supremacy were introduced, and required to be taken in their stead; the *stat. 1 Geo. 1. st. 2. c. 13*, contains an Oath of Supremacy, in the same words as the Oath of Supremacy required to be taken by *stat. 1 W. & M. st. 1. c. 8*. By that Oath persons are made to swear that “no foreign prince, person, prelate, State, or potentate, hath, or ought to have, any jurisdiction, power, supremacy, pre-eminence, or authority, ecclesiastical or spiritual, within the realm.” It was required to be taken by the persons therein named; it might be tendered to any person, by any two justices of the peace; and persons refusing the Oath so tendered

were adjudged to be Popish Recusants Convict, and to forfeit and to be proceeded against as such. This was the constructive Recusancy referred to above. See also title *Oaths*. It was not the offence itself of Recusancy, which, as already observed, consisted merely in the party's absenting himself from church; it was the offence of not taking the Oaths of Supremacy, and the other Oaths prescribed by the *stat. 1 Geo. 1. st. 2. c. 13*, the refusal of which was, by that statute, placed on the same footing as a legal conviction on the statutes of Recusancy; and subjected the party refusing to the penalties of those statutes. This was the most severe of all the laws against Papists. The punishment of Recusancy was penal in the extreme; and the persons objecting to the oath in question might be subjected to all the penalties of Recusancy, merely by their refusing the oath when tendered to them. It added to the penal nature of these laws, that the oath in question might be tendered, at the mere will of two justices of peace, without any previous information or complaint, before a magistrate, or any other person. Thus by refusing to take the Oath of Supremacy, when tendered to them, they became liable to all the penalties of Recusancy; and the same refusal, by *stats. 7 & 8 W. 3. c. 4: 1 Geo. 1. st. 2. c. 13*, restrained them from practising the law as advocates, barristers, solicitors, attorneys, notaries, or proctors; and from voting at elections. With respect to the declaration against popery, the *stat. 30 Car. 2. st. 2. c. 1*, contains the declaration, and prescribes it to be made by members of either House of Parliament before they take their seats. By it, they declare their disbelief of the doctrine of transubstantiation, and their belief that the invocation of saints, and the sacrifice of the mass, are idolatrous.

4. How the landed property of Papists was affected by the laws against Recusancy has been already mentioned. By *stat. 11 & 12 W. 3. c. 4*, it was enacted, that a person educated in the Popish religion, or professing the same, who did not in six months, after the age of sixteen, take the oaths of Allegiance and Supremacy, and subscribe the declaration prescribed by *stat. 30 C. 2. st. 2. c. 1*, should, in respect of himself only, and not of his heirs or posterity, be disabled to inherit or take lands by descent, devise, or limitation, in possession, reversion, or remainder; and that, during his life, till he took the oaths, and subscribed the declaration against popery, his next of kin, who was a Protestant, should enjoy the lands, without accounting for the profits; and should be incapable of purchasing; and that all estates, terms, interests, or profits out of lands, made, done, or suffered to his use, or in trust for him, should be void.

By *stat. 3 Jac. 1. c. 5: 1 W. & M. c. 26: 12 Ann. st. 2. c. 14: 11 G. 2. c. 17*, Papists or persons professing the Popish religion, were disabled from presenting to advowsons, and other ecclesiastical benefices, and to hospitals and other charitable establishments. By annual acts of the legislature, Papists being of the age of eighteen years, and not having taken the Oaths of Allegiance and Supremacy, were subjected to the burthen of the double land-tax. By *stat. 1 Geo. 1. st. 2. c. 55*, they were required to register their names and estates in the manner, and under the penalties, therein mentioned; and by *stat. 3 Geo. 1. c. 18*, continued by several subsequent statutes, an obligation of enrolling their deeds and wills was imposed on them. Such were the principal penal laws against Roman-Catholics, at the time of the accession of the House of *Brunswick*.

The above summary of the laws against Papists is extracted from the publication of a Roman-Catholic; it is observable that it does not exactly tally with the enumeration made by *Blackstone*, in 4 *Comm.* c. 4; but it is presumed, the above statement is as correct, as interest and conscience, two powerful incentives, could possibly make it. As an apology for the origin of these laws, the learned Commentator observes, that they are seldom exerted; and are rather to be accounted for from their history, and the urgency of the times which produced them, than to be approved, on a cool review, as a standing system of laws. The student will perceive the necessity of their being recapitulated in this work; as most of them are now only repealed on certain conditions (see *post* II.,) which, if not complied with, leave the Popish Recusant in a state, even yet by no means enviable; though, as it appears, absolutely necessary for the preservation of our constitution.

II. THE only act of any importance which, till the reign of his present Majesty, was passed for their relief, (and that operated but in an indirect manner for their benefit,) was *stat.* 3 *Geo.* 1. c. 18. On the construction of *stat.* 11 & 12 *W.* 3. c. 4, it had been held, that as it expressly confined the disability of Papists to take by descent to themselves only, and preserved their heirs and posterity from its operation, it was not to be construed as preventing the vesting of the freehold and inheritance in them, in cases of descent, or transmitting them to their posterity; but that the disability respected only the pernanacy of the profits, or beneficial property of the lands, of which it deprived them, during their non-conformity. Whether that part of the statute which relates to their taking by purchase should receive the same construction was a frequent subject of discussion, the statute being, in that branch of it, without any limitation. To remedy this, the said *st.* 3 *Geo.* 1. c. 18, was passed; it enacts, that no sale for a full and valuable consideration, by the owner or reputed owner of any lands, or of any interest therein, theretofore made, or thereafter to be made, to a Protestant purchaser, shall be impeached by reason of any disability of such Papist, or of any person under whom he claims, in consequence of *stat.* 11 & 12 *W.* 3. c. 4; unless the person taking advantage of such disability shall have recovered before the sale, or given notice of his claim to the purchaser; or before the contract for sale, shall have entered his claim at the quarter sessions, and *bona fide* pursued his remedy. The statute then recites the clauses of *stat.* 11 & 12 *W.* 3. c. 4, disabling Papists from purchasing; and afterwards enacts, that these clauses shall not be thereby altered or repealed, but shall remain in full force. This proviso is couched in such general words, that it created a doubt in some, whether it did not nearly frustrate the whole effect of the act. To this it was answered, that, notwithstanding the proviso, the enacting part of the statute was in full force, for the benefit of a Protestant purchaser; and that, the proviso operated only to declare that Papists themselves should not derive any benefit from the act, in any purchases they should attempt to make, under the foregoing clauses. This was considered the better opinion, and on the authority of it, many purchases of considerable consequence were made. See also *stat.* 6 *Geo.* 2. c. 5.

During the present reign, two statutes, each of great importance, have been passed in favour of the Roman-Catholics; by *stat.* 18 *Geo.*

3. c. 60, it was enacted, that so much of *stat. 11 & 12 W. 3. c. 4*, as related to the prosecution of the Popish priests and jesuits, and imprisoning for life Papists who keep schools, or to disable Papists from taking by descent or purchase, should be repealed, as to all Papists, or persons professing the Popish religion, claiming under titles not thentofore litigated, who, within six months after the act passed, or their coming of age, should take the oath therein prescribed.

This is an oath expressive of allegiance to his Majesty, abjuration of the Pretender, renunciation of the Pope's civil power, and abhorrence of the doctrines of destroying, and not keeping faith with, heretics; and of deposing or murdering princes excommunicated by authority of the See of Rome.

Upon this statute a case was decided in Chancery, *Dec. 18, 1783, Bunting v. Williamson*. A bill had been filed, claiming an estate given to a person professing the Popish religion, by will, alleging the incapacity occasioned by *stat. 11 & 12 W. 3. c. 4*. The testator died many years before, and after his death a suit had been instituted by another person who claimed as his heir at law, and that suit was depending at the time when the *stat. 18 Geo. 3. c. 60*. was passed; but was afterwards dismissed for want of prosecution. The plaintiff filed his bill some time after the act, claiming in right of his wife as heir at law. The defendants pleaded their title under the testator's will; and that the defendant, who was beneficially interested, having or claiming the estate under that will, had taken the oath prescribed by the act; and concluded with an averment, that the title had not been before litigated by the plaintiff, or any person under whom he claimed. The plaintiffs, on argument of the plea, contended, that the words *not hitherto litigated*, extended to the case then before the court, because the title had been litigated, and was in litigation at the time the act passed. But the lords commissioners *Ashhurst* and *Hotham* were clearly of opinion, that the plaintiff not having before litigated the title, nor claiming under any person who had litigated it, the case of the defendants was within the benefit of the act, notwithstanding the prior litigation; and the plea was allowed.

The *Stat. 31 Geo. 3. c. 32*, has afforded the most effectual relief yet bestowed on the Roman-Catholics. That statute may be divided into six parts: the 1st contains the declaration and oath afterwards referred to in the body of the act, and prescribes the method of taking it: the 2d is a repeal of the statutes of Recusancy, in favour of persons taking the oath thereby prescribed: the 3d is a toleration, under certain regulations, of the religious worship of the Roman-Catholics, qualifying in like manner, and of their schools for education: the 4th enacts, that in future no one shall be summoned to take the Oath of Supremacy prescribed by *stats. 1 W. & M. st. 1. c. 8: 1. Geo. 1. st. 2. c. 13*: [But electors of members of parliament in *England*, still remain bound to take this Oath: See *post* III.; and this Dict. title *Parliament*.] or the declaration against transubstantiation required by *stat. 25 Car. 2. c. 2*; that the *stat. 1 W. & M. st. 1. c. 9*, for removing Papists, or reputed Papists, from the cities of *London* and *Westminster* shall not extend to Roman-Catholics taking the appointed oath; and that no peer of *Great Britain* or *Ireland*, taking that oath, shall be liable to be prosecuted for coming into his Majesty's presence, or into the Court or house where his Majesty resides, under *stat. 30 Car. 2. c. 1*. The 5th part of the act repeals the laws requiring the deeds and

wills of Roman-Catholics to be registered or inrolled; the 6th excuses persons acting as counsellors at law, barristers, attorneys, clerks, or notaries, from taking the Oath of Supremacy or the declaration against transubstantiation.

To state this statute something more particularly: Roman-Catholics, who are willing to comply with the requisitions contained in it, must appear at some of the Courts at *Westminster*, or at the Quarter Sessions held for the county, city, or place where they shall reside, and shall make and subscribe a declaration, that they profess the Roman-Catholic religion; and also an oath, which is nearly similar to that required by *stat. 18 Geo. 3. c. 60*, the substance of which is stated above; the chief difference in the oath is, that the words of that in *stat. 31 Geo. 3. c. 32*, are stronger, and more adapted to present times and circumstances, and probably intended to be less liable to equivocation or evasion. Of this declaration and oath being duly made by any Roman-Catholic, the officer of the Court shall grant him a certificate; and such officer shall yearly transmit to the Privy Council, lists of all persons who have thus qualified themselves within the year in his respective Court. The statute then provides, that a Roman-Catholic thus qualified shall not be prosecuted under any statute for not repairing to a parish church, nor shall he be prosecuted for being a Papist, nor for attending or performing mass or other ceremonies of the church of *Rome*; provided that no place shall be allowed for an assembly to celebrate such worship until it is certified to the Sessions; nor shall any minister officiate in it until his name and description are recorded there. And no such place of assembly shall have its doors locked or barred during the time of meeting or divine worship.

And if any Roman-Catholic whatever is elected constable, churchwarden, overseer, or into any parochial office, he may execute the same, by a deputy, to be approved as if he were to act for himself as principal. But every minister who has qualified shall be exempt from serving upon juries, and from being elected into any parochial office. And all the laws for frequenting divine service on *Sundays* shall continue in force; except where persons attend some place of worship allowed by this statute, or the Toleration Act of the *Dissenters*; *stat. 1 W. & M. st. 1. c. 8*.

And if any person disturb a congregation allowed under this act, he shall, as for disturbing a dissenting meeting, be bound over to the next sessions, and, upon conviction there, shall forfeit 20*l*.

No Roman-Catholic minister shall officiate in any place of worship having a steeple and a bell, or at any funeral in a church or churchyard, or shall wear the habits of his order, except in a place allowed by this statute, or in a private house where there shall not be more than five persons besides the family. This statute shall not exempt Roman-Catholics from the payment of tithes, or other dues, to the church; nor shall it affect the statutes concerning marriages, or any law respecting the succession to the Crown. No person who has qualified shall be prosecuted for instructing youth, except in an endowed school, or a school in one of the *English Universities*; and except also, that no Roman-Catholic schoolmaster shall receive into his school the child of any Protestant father; nor shall any Roman-Catholic keep a school until his or her name be recorded as a teacher at the sessions.

No religious order is to be established; and every endowment of a school or college by a Roman-Catholic shall still be superstitious and unlawful.

The first part of the above act gives rise to two observations. The declaration prescribed by the act is contained in these words: "I, *A. B.* do hereby declare, that I do profess the Roman-Catholic religion." Till the passing of this act, the persons who were the subject of it were known in the *English* law by the name of Papists, reputed Papists, or persons professing the Popish religion. By requiring this declaration from them, the law has imposed on them, and probably will in future recognise them by, the name of Roman-Catholics. Still, when the antient penal laws against them are to be mentioned with professional accuracy, it seems absolutely necessary to mention them under the name applied to them by the abrogated law. The other observation was of more importance. As the bill was originally framed, and as it stood, when, having passed the Commons, it was brought into the House of Lords, the first clause in it directed, that the oath contained in the *stat. 18 Geo. 3. c. 60*, should be taken no longer; but that the oath appointed by the bill should, in future, be administered in its stead, and should give the same benefits and advantages, and should operate to the same effects and purposes, as the oath contained in the statute *18 G. 3. c. 60*. This clause was altered, in the House of Lords, to the form in which it stands in the act. It does not express that the oath contained in it shall entitle the persons taking it to the benefits of the *st. 18 G. 3. c. 60*. it only expresses that it shall be lawful for Catholics to take the oath prescribed at the places and times, and in manner, therein mentioned. Thus it was uncertain whether persons taking only the oath prescribed by the *stat. 31 Geo. 3. c. 32*, would be entitled to the benefit of the *stat. 18 Geo. 3. c. 60*, so as to be relieved from the penalties and disabilities from which the persons taking the oath prescribed by that act were released by it. The chief of these penalties and disabilities were those inflicted by *stat. 11 & 12 W. 3. c. 4*, which disabled them from taking by descent or purchase: and it was thought advisable for every Roman-Catholic, who wished to be secure in the enjoyment of his landed property, to take both the declaration and oath prescribed by the *stat. 31 Geo. 3. c. 32*; and the oath prescribed by the former *stat. 18 Geo. 3. c. 60*.—But all doubt on this subject is now removed by *stat. 43 G. 3. c. 30*, which after reciting the inconvenience above stated enacts, "That the declaration and oath contained in the act *31 G. 3.* shall, as to all persons who *have* made, taken, and subscribed the same, or who at any time hereafter *shall* make, take, or subscribe the same, give the same benefits and advantage, and be, and operate to and for the same intents and purposes as in and by the said act of *18 G. 3.* is enacted, expressed, and declared of and concerning the oath thereby subscribed."

As to the double land-tax, that, being imposed by the annual land-tax act, a repeal of it could not be effected by any prospective act. It was repealed, by omitting from the annual land-tax act the clause imposing it. The land-tax act of the year 1794, &c. contained also a clause, which, after reciting that lands formerly liable to a double assessment were then possessed by Protestants, enacted, that where any place, in consequence of that circumstance, should be rated at more than four shillings in the pound, the commissioners might, on application, examine into the truth of the complaint, and certify the same

to the barons of the Exchequer, who are empowered to discharge the excess. See title *Land-Tax*.

III. THE Statute 1 *W. & M. st. 1. c. 18*, (commonly called the *Toleration-Act*;) exempts all Dissenters, except Papists and such as deny the Trinity, from all penal laws relating to religion; provided they take the Oaths of Allegiance and Supremacy, and subscribe the declaration against Popery, and repair to some congregation registered in the Bishop's Court, or at the Sessions. But there is nothing in this act which dispenses either with the Test-Act or the Corporation-Act, so far as they impose the obligation of receiving the sacrament of our Lord's Supper on persons serving in offices or elected to serve in corporations; and there is nothing in the statute 31 *Geo. 3. c. 32*, which dispenses Catholics from that obligation, in case of their serving in offices, or being admitted into corporations. With respect therefore to the Test-Act and Corporation-Act, these are the only statutes which subject the Protestant dissenters to any penalties or disabilities; to these the Roman-Catholics are subject equally with the Protestant dissenters: there is, therefore, no penalty or disability that affects the Protestant dissenters, to which Roman-Catholics are not subject equally; but there still remain several penalties and disabilities to which Roman-Catholics are subject, that do not in any respect whatever affect the Protestant Dissenters.

The principal of these are, that by *stat. 30 Car. 2. st. 2. c. 1*, Roman-Catholics, in consequence of refusing the Oath of Supremacy, or the declaration against Popery, *are disabled from sitting in either House of Parliament*. By *stats. 7 & 8 W. 3. c. 27*, those who refuse to take the Oath of Supremacy *are disabled from voting at elections* (in Great Britain); and by several statutes, Roman-Catholics are disabled *from presenting to advowsons*. This latter is peculiar to them; Quakers, and even Jews, having the full enjoyment of the right of presentation. This restraint seems the more unnecessary, as no person can be presented to a living who has not been ordained according to the rites of the Church of England. Previously to his ordination he is examined on his faith and morals by his bishop; he takes the Oath of Allegiance and Supremacy, and subscribes the Thirty-nine Articles; and previously to his admission, he subscribes the three articles respecting the Supremacy, the Common Prayer, and the Thirty-nine Articles; and he makes the Declaration of Conformity. By the Act of Conformity, *stat. 13 & 14 Car. 2. c. 4*, he is bound to use the Common Prayer, and other rites and ceremonies of the Church of England.

Under the *stat. 3 Jac. 1. c. 5*, which disables Popish Recusants Convict from presenting to benefices, it has been adjudged, that the person is only disabled to present; and that he continues patron to all other purposes. *Cawley* 230. That such a person, by being disabled to grant an avoidance, is not hindered from granting the advowson itself, in fee, or for life, for good consideration. 1 *Jon.* 19, 20. And that if an advowson or avoidance belonging to a Papist come into the King's hands, by reason of an Outlawry, or conviction of Recusancy, &c. the King, and not the Universities, shall present. 1 *Jon.* 20: *Hob.* 126. But where a presentment is vested in the University, at the time when the church becomes void, it shall not be divested again by the patron's conforming, &c. 10 *Repl.* 57.

Grants of advowsons, or right of presentation to churches, &c. by any Papists, or person anywise in trust for him, to be void, except made for valuable consideration to some Protestant purchaser, for the benefit of a Protestant only; and persons claiming under such grant shall be deemed as trustees for a Papist, and they and their presentees be compelled to make discovery thereof, and the intent. See *stats. 12 Ann. st. 2. c. 14: 11 Geo. 2. c. 17.*

And bishops are required to examine parsons presented, on oath, before institution; whether the person presenting be the real patron, and made the presentation in his own right, or whether he be not a trustee for a Papist, &c. And if the parson presented refuse to be examined, his presentation shall be void.

By the last Indemnity-Act, 35 G. 3. c. 99, thought necessary (even after the act 31 G. 3. c. 32.) to allow time for inrolling deeds and wills of Papists, there is a proviso that nothing therein shall make good any grant of the right of presentation to any benefice, &c. in trust for a Papist.

Upon the Corporation-Act, it seems to have been the prevailing opinion, that the election of a person who did not comply with the requisites of that statute, and all the acts done by him, were void. To prevent the consequences of this, the *stat. 5 Geo. 1. c. 6*, was passed, intituled, "An Act for quieting and establishing Corporations;" by which it was enacted, that no incapacity, disability, forfeiture, or penalty should be incurred, unless the person were removed, or a prosecution commenced against him, within six months after his election. It was also enacted, that the acts of the person omitting to qualify should not be avoided. Upon this act an important question arose, whether dissenters, being ineligible to public offices, could be obliged to fine for not serving them. This point came to a direct issue, in the case of *Harrison v. Evans*, (see this Dictionary, title *Dissenters*.) when it was determined in favour of the dissenters. For the relief of those who omit to qualify for serving in offices, or for being elected into corporations, an act of parliament is past annually, by which, after mentioning the Corporation and Test Acts, and some others which do not relate to the point under consideration, it is enacted, that persons who, before the passing of the act, have omitted to qualify in the manner prescribed by those acts, and who shall properly qualify before the 25th of the ensuing *December*, shall be indemnified against all penalties, forfeitures, incapacities, and disabilities; and their elections, and the acts done by them, are declared to be good. There is nothing in this act which excludes Catholics from the benefit of it.

By the *Militia Acts*, previous to 42 Geo. 3. cc. 90, 91, the oath required to be taken by persons inrolled in the militia of *Great Britain*, was as follows, "I, *A. B.* do sincerely promise and swear, that I will be faithful and bear true allegiance to his Majesty King *George*, his heirs and successors. And I do swear, that *I am a Protestant*, and that I will faithfully serve in the militia, within the kingdom of *Great Britain*, for the defence of the same, during the time for which I am inrolled, unless I shall be sooner discharged." In the acts of 42 Geo. 3. the words declaring the person to be a Protestant are omitted. With respect to the right of Roman-Catholics to serve on *Juries*, there does not appear to have ever been any law which subjected them to any disability, except the statutes generally called

the Statutes of Recusancy. The *stat. 13 Car. 2. st. 2. c. 1*, commonly called the Corporation-Act, relates to those offices only which concern the government of cities and corporations. The *stat. 25 Car. 2. c. 2*, commonly called the Test-Act, since explained by *stat. 9 Geo. 2. c. 26*, regards only civil and military offices. Neither of these acts, therefore, abridges Catholics of the right in question. With respect to the statutes of Recusancy, among other penalties to which these subjected Popish Recusants Convict, one was, that they became liable, upon conviction, to all the consequences of excommunication; and it has been generally understood, that persons excommunicated are disabled from serving on juries. It has been already observed, that, in the proper sense of the word, not attending the service of the Church of *England* alone, and unaccompanied by any other circumstance, constitutes Recusancy. Of this non-attendance at church, every Roman-Catholic, necessarily, was guilty, and he might be convicted of it by a very summary process. But till his guilt was established in a judicial manner, the law did not take notice of it; and therefore, unless an actual conviction had taken place, he was not subject to any of the penalties consequent on Recusancy. But it has been mentioned, that there was, besides this, a species of constructive Recusancy, to which every Catholic was liable, by refusing to make the declaration against Popery, and to take the Oath of Supremacy. This had a more direct operation on their ability to serve as Jurors. Now, as well the declaration against Popery as the Oath of Supremacy might be tendered to a Catholic in the very court where he presented himself to serve as a jurymen: a refusal amounted to conviction; on conviction he became subject to all the penalties of excommunication, and one of those penalties, (at least, by the opinion of the old lawyers,) was a disqualification to serve on juries. Thus, it was always in the power of the court, and perhaps of any two Magistrates present, to convict, on the spot, a Catholic of Recusancy, and thereby render problematical at least his capacity to serve as a juror. Such appears to have been the situation of Catholics, in this respect, previously to the *stat. 31 G. 3. c. 32*. Since the passing of that act, they stand, as to the serving upon juries, in the same predicament as the rest of his Majesty's Subjects. By that statute, they are freed from the penalties incident either to positive or to constructive Recusancy. It has been stated, that ministers of Roman-Catholic congregations are exempted from serving on juries, by § 8 of the statute; it seems to follow, therefore, that, without this clause, they would have been liable to serve; and consequently, that all persons out of the reach of this clause are in the eye of the law subject to the duty, and have, of course, the capacity of serving.

It has been heretofore said, that persons convicted of Popish Recusancy may be taken up by the writ *de excom. capiend.*, and shall not be admitted as competent witnesses in a cause: but this seems to be carried beyond the intent of the statute. 2 *Bulst.* 155, 156.

With respect to the right of Roman-Catholic merchants to be summoned to the meetings of *British* factories abroad, it appears, that they have, and always had, a right to be admitted to them. The meetings of the factory in *Portugal* were regulated by *stat. 8 Geo. 1 c. 17*, but that act contains nothing which discriminates Roman-Catholics from other merchants. All the foreign factories are, therefore, in this respect, in the same predicament. Now, if Roman-Catholics are

excluded from factories by any act, it must be either by the Corporation-Act or by the Test-Act. But with respect to the Corporation-Act, it is to be observed, that a factory is not a Corporation, in the legal acceptation of that word; and even if it were, it would not fall within the operation of the Corporation-Act, as that is confined to cities, corporations, &c. within *England* and *Wales*, and the town of *Berwick-upon-Tweed*. The operation of the Test-Act is more extensive than the operation of the Corporation-Act; it expressly mentions his Majesty's Navy, the islands of *Jersey* and *Guernsey*, and persons who should be admitted into any service or employment in his Majesty's or the Prince of *Wales*' household within the districts therein mentioned. A factory abroad does not, therefore, fall within the operation of that act. Besides, the privilege of being admitted to the meetings of a foreign factory is not an office, or even a right, of that description which falls within either of those acts. There is a reason to suppose, that, in point of fact, Roman-Catholics have not generally been summoned to attend meetings of factories since the year 1720. But the operation and tendency of the laws against Catholics seem to have been such as induced them to forbear asserting some of their most valuable rights, even such as were of the most indisputable nature, rather than obtrude themselves into public notice. If they wish to enforce their right of admission, or their right of voting, they should give notice of their desire to be summoned, and offer to attend at the meetings; then, if admittance should be refused them, or their votes rejected, the proceedings will be illegal; and not only they, but all other persons subject to the proceedings of the factory, will be justified in refusing to pay their contribution-money, or to comply in any other manner with the resolutions or orders of the meeting. Besides, a refusal to admit them to the meetings is certainly a personal injury; and wherever a personal injury is done to an *English* Subject abroad, the remedy must be sought in the jurisdiction where the cause of action happens, if it is subject to the King's jurisdiction; if the King has no jurisdiction in that place, this necessarily gives the King's Court a jurisdiction, within which it is brought, by the known fiction of laying the venue in some county of *England*. This is explained by Lord *Mansfield*, in his argument in *Fabrigas v. Mostyn*, *Cowp.* 170: See also *Phillybrown v. Ryland*, *Stra.* 624: *Ld. Raym.* 1388: 8 *Mod.* 354. And as to the general principle of such an action, see *Ashby v. White*, 6 *Mod.* 45: 1 *Salk.* 19: *Bro. Parl. Ca.*: and this Dictionary, title *Parliament*, VI. B. 3.

What has been said of the right of Roman-Catholics to insist on being admitted to the meetings of *English* factories abroad, and of their means of redress, in case of refusal, applies, with proper qualifications, to every other case, of a similar description, where their right of admission, acting, or voting, is refused them.

On the right of Roman-Catholics to hold offices exercisable abroad, it has been observed, that the Corporation Act extends only to cities, &c. within *England* and *Wales*, and the town of *Berwick-upon-Tweed*; that the Test Act mentions only those places, and his Majesty's Navy, and *Jersey* and *Guernsey*; and that the *stat.* 31 *Geo.* 3. c. 32, repeals the statutes of Recusancy, and relieves Roman-Catholics from the penalties imposed on them for refusing the Oath of Supremacy, and the declaration against Popery: it seems therefore to follow, that there is now in force no law which disables Roman-Catholics from

holding offices wholly exercisable abroad, or from serving or holding offices under the *East India* company, in their foreign possessions. Besides, upon the construction of these laws, and every other law supposed to affect the Roman-Catholics, there seems reason to think, that the same spirit which induced the Legislature to repeal so large a proportion of the penal code against them, will influence the judicature in their construction of the unrepealed part of that code, or of any other statute unfavourable to them, in its apparent tendency or operation, so far as it may be open to a doubtful interpretation.

IV. IRISH Acts of Parliament. The first step taken in the present reign to give relief to the Papists in *Ireland*, was by the acts 1 G. 3. c. 12 & 13: 3 G. 3. c. 26: & 13, 14 G. 3. c. 25, by which the possessions of Protestants were protected, who derived title from or through Papists.

The next step was by enabling Papists to take leases for 61 years, of not more than 50 acres of unprofitable bog, for the purpose of reclaiming the same. 11, 12 G. 3. c. 21.

By 13, 14 G. 3. c. 35, an oath of allegiance and a Declaration was framed for the Papists, and which they were allowed to take, "in order to give them an opportunity of testifying their allegiance, and to promote peace and industry among the inhabitants."—By 17, 18 G. 3. c. 49, Papists taking and subscribing this Oath and Declaration, were empowered to take leases for 999 years at a *bona fide* money-rent reserved; and to dispose of the same by will or otherwise. And all lands and tenements whereof any Papist was or should be seized, were declared to be descendible, devisable, and transferrible, as fully as if the same were in the seizer of any other subjects.

By 21, 22 G. 3. c. 24, Papists taking Oath, &c. required by 13, 14 G. 3. are empowered to purchase, or take by grant, limitation, descent, or devise, any lands, tenements, or hereditaments in *Ireland*, or any interest therein, (except advowsons, and except any manor or borough returning members of Parliament,) and to dispose of the same by will or otherwise; and such lands, &c. so purchased or taken, shall be descendible according to the course of the common law; and devisable, and transferrible in like manner as the lands of Protestants. Popish Ecclesiastics taking the said Oath, are exempted from all penalties and disabilities under former acts. Various minor disabilities are also removed by this act, and 21, 22 G. 3. c. 62: & 30 G. 3. c. 29.

By 32 G. 3. c. 21, Papists (taking the Oath required by 13, 14 G. 3. c. 35.) are enabled to be Barristers, Attorneys, Solicitors, or Notaries: but not King's Counsel. By the same act, marriages of Papists with Protestants is allowed.

By 33 G. 3. c. 21, the last and most effectual act passed in *Ireland* for the relief of the Papists, it is enacted, that no Subject being a Papist, or married to, or educating children Papists, (taking the Oath, &c. required by 13, 14 G. 3. c. 35.) shall be liable to any penalty or disability, or to any law for limiting, charging, or discovering their estates, or touching the acquiring of property, or securities affecting it, save such as Protestants are liable to. And all such parts of Oaths required to be taken at voting, or to qualify for voting for members of Parliament, as deny the so being a Papist, &c. shall not in future be required to be taken by any voter, but shall be omitted to be administered; and such Papists shall not be required, previous to vo-

ting, to take Oaths of Allegiance and Abjuration. § 1. And see 37 G. 3. c. 47. § 19, as to Papist voters taking the Oath required by 13, 14 G. 3. c. 35: and this act, 33 G. 3. before the teste of the writ.

By the same act, 33 G. 3. c. 21. § 7, it is declared lawful for Papists (taking the Oath, &c. required by 13, 14 G. 3. c. 35, and an additional Oath prescribed by this act, 33 G. 3.) to hold, exercise, or enjoy all civil and military offices or places of trust or profit under his Majesty in *Ireland*; and to take degrees and be professors in any College to be founded as a member of Trinity College, *Dublin*, not being exclusively for Papists; and to hold any office or place of trust in, and to be a member of any Lay Body Corporate, (except Trinity College, *Dublin*) without taking Oaths of Allegiance, Supremacy, or Abjuration, &c. With the following *Exceptions*, viz. § 9; Papists are not allowed to sit or vote in either House of Parliament, nor to exercise or enjoy any of the following offices, &c. Lord Lieutenant: Lord Chancellor, Keeper, &c.: Lord High Treasurer: Chancellor of the Exchequer: Chief Justices, Chief Baron, or Judge of the Courts of King's Bench, Common Pleas, or Exchequer: Judge of Admiralty: Master of the Rolls: Secretary of State: Keeper of Privy Seal: Vice Treasurer, or his Deputy: Teller or Cashier of Exchequer: Auditor General: Lieutenant, Governor, or Custos Rotulorum of Counties: Secretary to Lord Lieutenant: Privy Counsellor: Prime Serjeant: Attorney or Solicitor General: Second and Third Serjeant: King's Counsel: Master in Chancery: Provost or Fellow of *Dublin* College: Post Master General: Master and Lieutenant-General of the Ordnance; Commander in Chief of the Forces: General on the Staff: Sheriff or Sub-Sheriff of any County; or any office contrary to the Act of Settlement and the New Rule, under act 17 & 18 Car. 2. And by § 10, Papists are declared not to be enabled to exercise any right of Presentation to any Ecclesiastical Benefice.

By 35 G. 3. c. 21. an Academy was authorised to be established for the education of Papists; in consequence of which the College at *Maynooth* was founded, and has been from time to time supported by grants from Parliament.

PAR, A term in Exchange, where a man to whom a bill is payable receives of the acceptor just so much in value, &c. as was paid to the drawer by the remitter. *Merch. Dict.* And in exchange of money, Par is defined to be a certain number of pieces of the coin of one country, containing in them an equal quantity of silver to that of another number of pieces of the coin of some other country; as where thirty-six shillings of the money of *Holland* have just as much silver as twenty shillings *English* money; and bills of exchange drawn from *England* to *Holland*, at the rate of thirty-six shillings *Dutch*, for each pound sterling, is according to the Par. *Locke's Consid. of Money*, 18.

PARACIUM, The tenure between parceners, viz. that which the youngest oweth to the eldest. *Domesday*.

PARAGE, *paragium*.] Equality of name, blood, or dignity; but more especially of land, in the partition of an inheritance between coheirs: hence comes to disparage and disparagement. *Co. Litt.* 166. *Paragium* was also commonly taken for the equal conditions betwixt two parties, to be contracted in marriage; for the old laws did strictly provide, that young heirs should be disposed in matrimony *cum paragio*, with persons of equal birth and fortune, *sine disparagacione*. See title *Tenure*.

PARAMOUNT, From the French *par*, i. e. *per* and *monter*, *ascendere*.] Signifies in our law the highest lord of the fee, of lands, tenements, or hereditaments. *F. N. B.* 135. As there may be a lord mesne, where lands are held of an inferior lord, who holds them of a superior under certain services; so this superior lord is lord Paramount: and all honours, which have manors under them, have lords Paramount. The King is said to be chief lord, or lord Paramount of all the lands in the kingdom. *Co. Litt.* 1. See title *Tenures*.

PARAPHARNALIA, or **PARAPHERNALIA**, from the Greek *Παρά, Præter*, and *Περγή, Dos*.] Those goods which a wife is entitled to [*secum fert*] over and above her dower or jointure, after her husband's death. See title *Baron and Feme* IV. 7.

PARASITUS, A domestic servant. *Blount*.

PARAVAIL, *per-availe*.] Tenant *Paravail* is the lowest tenant of the fee, or he who is immediate tenant to one who holdeth over of another; and he is called tenant *Paravail*, because it is presumed he hath profit and avail by the land. *F. N. B.* 135: 2 *Inst.* 296: 9 *Repl.* See title *Tenure*.

PARCELLA TERRÆ, A parcel of land used in some ancient charters.

PARCEL-MAKERS, Two officers in the Exchequer that make the Parcels of the escheators' accounts, wherein they charge them with every thing they have levied for the King's use within the time of their being in office, and deliver the same to the auditors to make up their accounts therewith. *Practice Excheq.* 99.

PARCENERS,

QUASI Parcellers; i. e. *rem in parcellas dividentes*.] Persons holding lands in copartnership, and who may be compelled to make division. See *Litt.* § 241. These are of two sorts; viz. Parceners according to the course of the Common Law; and Parceners according to custom.

I. *Of the Nature of an Estate in Parcenary, or Coparcenary.*

II. *How such Estate may be parted or dissolved, and the Consequences thereof.*

I. **PARCENERS** by the Common Law, are where a man or woman seised of lands or tenements in fee-simple or fee-tail hath no issue but daughters, and dieth, and the tenements descend to such daughters, who enter into the lands descended to them, then they are called Parceners, and are as but one heir to their ancestor; and they are termed Parceners, because by the writ *de partitione faciendâ* the law will constrain them to make partition; though they may do it by consent, &c. *Litt.* 243: 1 *Inst.* 164. And if a man seised of lands in fee-simple, or in tail, dieth without any issue of his body, begotten, and the lands descend to the sisters, they also are Parceners; and in the same manner where he hath no sisters, but the lands descend to his aunts, or other females of kin in equal degree, they are also Parceners; but where a person hath but one daughter she shall not be called Parcener, but daughter and heir, &c. *Litt.* § 242.

If a man hath issue two daughters, and the eldest hath issue divers sons and daughters, and the youngest hath issue divers daughters; the eldest son of the eldest daughter shall not inherit alone, but all the

daughters of the youngest shall inherit, and the eldest son is coparcener with the daughters of the youngest sister, and shall have one moiety, *viz.* his mother's part; so that men descending of daughters may be Parceners, as well as women, and shall jointly plead and be impleaded, *Sc. 1 Inst.* 164. None are Parceners by the Common Law, but either females, or the heirs of females, who come to lands or tenements by descent. *Litt.* 254.

Parceners by custom is, where a person seised in fee-simple, or in fee-tail of lands or tenements of the tenure called *gavelkind*, hath issue divers sons, and dies; such lands shall descend to all the sons as Parceners by the custom, who shall equally inherit and make partition as females do, and writ of partition lies in this case, as between females, *Sc. Litt.* § 265. Women Parceners make but one heir, and have but one freehold; but between themselves they have in judgment of law several freeholds to many purposes; for one of them may enfeoff the other of her part; and the parcenary is not severed by the death of any of them; but if one dies, her part shall descend to her issue, *Sc. 1 Inst.* 164, 165. If one Parcener make a feoffment in fee of her part, this is a severance of the coparcenary, and several writs of *præcipe* shall lie against the other Parceners and the feoffee. *1 Inst.* 167. Though if two coparceners by deed alien both their parts to another in fee, rendering to them two, and their heirs, a rent out of the land, they shall have the rent in course of parcenary; because their right in the land out of which the rent is reserved was in parcenary. *Ibid.* 160.

If there be two Parceners, and each of them taketh husband, and have issue, and the wives die, the parcenary is divided, and here is a partition in law. *1 Inst.* 160. Partition of lands held in tail, by the death of one sister without issue is made void, and the other sister as heir in tail will be entitled to the whole land, and have writ of *formedon* where the other Parcener hath aliened. *New Nat. Br.* 476. And a writ of *nuper obiit* lies for one Parcener deformed by another, *Sc. F. N. B.* 197.

If any Parceners or their issues be disseised, they must join in an assise against the disseisor; so if they have cause to bring any action of waste, *Sc. 1 Inst.* 95, 198. Two Parceners are of land, one enters and claims the whole, and is disseised, she alone may maintain assise; but if the disseisin be of rent, the other Parceners must be named, or the writ shall abate. *Jenk. Cent.* 41, 42.

The possession of one Parcener, *Sc.* of land, without an actual ouster, gives possession to the other of them. *Hob.* 120: *Dyer* 128. One Parcener may justify detaining the deeds, concerning the lands, against another, as they belong to one as well as the other. *2 Roll. Abr.* 31.

Parceners are to make partition of the lands descended; and estates of coparcenary at Common Law are applicable only to inheritances: partition may be made between Parceners of inheritances which are entire and dividable, as of an advowson, rent-charge, or such like; but it is otherwise of inheritances which are not entire and indivisible, as of a piscary, common without number, or such uncertain profits out of lands; for in such case the eldest Parcener shall have them, and the others have contribution from her out of some other inheritance left by the ancestor; but if there be no such inheritance, then the eldest shall have these uncertain profits for one time, and the youngest for another time. *Dyer*, 153. See *post* II.

Parceners cannot make partition, so as for one to have the land for one time, and another for another, &c. for each is to have her part absolutely; but if an advowson descend to them, they may present by turns; and if there be a common, &c. which may not be divided, one may have it for one year, and another for another year, &c. 1 *Inst.* 164.

An advowson is an entire thing, and yet, in effect, the same may be divided betwixt Parceners, for they may present by turns; and if there be coparceners of an advowson appendant to a manor, and they make partition of the manor, without mentioning the advowson, the same is still appendant, and they may present by turns. 8 *Rep.* 79. If two Parceners be of an advowson, and they agree to present by turns, this is a good partition as to the possession; but it is not a severance of the estate of inheritance. 1 *Rep.* 87.

If three coparceners of an advowson do not agree to present on a vacancy, the eldest, or her assigns, may present on the first turn; and the second and third, or their assigns, to the next turns, according to the order of the birth of the coparceners. 1 *H. Blackst.* 412. See *post* II.

In pleading a right in coparcener to present to an advowson by turns, it is good to state that the right arose because they *did not* agree to present, which is synonymous to saying they *could not* agree. 1 *H. Blackst.* 376.

If one Parcener hath a rent granted to her upon a partition made to make her part equal with the other, she may distrain for the arrears of common right; and so shall the grantee of the rent, because it is not annexed to her person only, but to her estate. 3 *Rep.* 32.

In the case of coparceners of a title of honour the King may direct which one of them and her issue shall bear it; and if the issue of that one become extinct, it will again be in abeyance, if there are descendants of more than one sister remaining. But upon the failure of the issue of all, except one, the descendant of that one being the sole heir, will have a right to claim, and to assume the dignity.

There are instances of a title, on account of a descent to females being dormant, or in abeyance, for many centuries. *Harg. Co. Litt.* 165.

Lord Coke says, there is a difference in an office of honour, which shall be executed by the husband or deputy of the eldest. *Ibid.* Yet when the office of Great Chamberlain had descended to two sisters, co-heiresses of the Duke of Ancaster, one of whom was married to *Peter Burrell*, esq. the Judges gave it as their opinion in the House of Lords, "that the office belongs to both sisters; that the husband of the eldest is not of right entitled to execute it; and that both sisters may execute it by deputy, to be approved of by them; such deputy not being of a degree inferior to a knight, and to be approved of by the King." See *Bro. P. C.*

The *properties* of Parceners are in some respects like those of joint-tenants; they having the same unities of *interest, title, and possession*. They may sue and be sued jointly for matters relating to their own lands. *Co. Litt.* 164. And the entry of one of them shall in some cases enure as the entry of them all. *Co. Litt.* 188, 243. They cannot have an action of trespass against each other; but they differ from joint-tenants, in that that they are also excluded from maintaining an action of waste, 2 *Inst.* 403; for coparceners could at all times put a

stop to any waste by writ of partition; but till the statute of *Hen. 8*, joint-tenants had no such power. See title *Joint-Tenants*.

Parceners also differ materially from joint-tenants in four other points: 1. They always claim by descent, whereas joint-tenants always claim by purchase. Therefore, if two sisters purchase lands, to hold to them and their heirs, they are not Parceners but joint-tenants. *Litt.* § 254. And hence it likewise follows, that no lands can be held in coparcenary but estates of inheritance, which are of a descendible nature; whereas not only estates in fee and in tail, but for life or years, may be held in joint-tenancy.

2. There is no unity of *time* necessary to an estate in coparcenary: for if a man hath two daughters, to whom his estate descends in coparcenary, and one dies before the other, the surviving daughter and the heir of the other, or when both are dead, their two heirs are still Parceners; the estate vesting in them each at different times, though it be the same quantity of interest, and held by the same title. *Co. Litt.* 164, 174.

3. Parceners, though they have an *unity*, have not an *entirety* of interest. They are properly entitled each to the whole of a distinct moiety, *Co. Litt.* 163, 4; and of course there is no *jus accrescendi*, or survivorship, between them, for each part descends severally to their respective heirs, though the unity of possession continues; and as long as the lands continue in a course of descent, and united in possession, so long are the tenants therein, whether male or female, called Parceners. But if the possession be once severed by partition, they are no longer Parceners, but tenants in severalty; or if one Parcener alienes her share, though no partition be made, then no longer are the lands held in *coparcenary*, but in common. *Litt.* § 309: and see 2 *Comm. c.* 12. *p.* 187, 8.

One having real and personal estates gave by his will several legacies and annuities, which he directed to be paid out of his real and personal estates which he charged therewith: and then demised certain lands to *A.* and *H.* (two of his five daughters) and their heirs as tenants in common, on condition that in case they or either of them should have no issue, they or she having no issue should have no power to dispose of her share except to her sister or sisters, or their children: and he devised all the rest and residue of his real and personal estates to *A.* and *H.* in fee, whom he made his executrices; on his death *A.* and *H.* entered, and afterwards *A.* levied a fine of her moiety to the use of her husband, in fee, and died: the Court of *K. B.* held, that the condition against alienation, except to sisters, or their children, was good: and that for the breach of it by *A.* in levying the fine, the coheirresses of the devisor might enter on her moiety; it being a remainder on which the residuary clause did not operate. The Court held also that one of the several coheirresses of the devisor might enter for non-performance on breach of the condition, and recover her own share, in ejectment, and that where the entry upon a claim by one of several coparceners, who make but one heir, is lawful, such entry made generally will vest the seisin in all, as the entry of all. *Doe, d. Gill v. Pearson*, 6 *East's Rep.*

II. PARTITION, between Parceners, may be made four ways: *viz.* First, When they themselves divide the lands equally into as many

parts as there are Parceners, and each chooses one share or part, the eldest first, and so one after another, &c.

Secondly, When they agree to choose certain friends to make division for them.

Thirdly, Partition by drawing lots, where having divided the lands into as many parts as there are Parceners, and written every part in a distinct scroll, being wrapt up, they each draw one.

And *fourthly*, Partition by writ *de partitione facienda*, which is by compulsion, where some agree to partition, and others do not; and when judgment is given on a writ of partition, it is that the Sheriff shall go to the land, and by the oaths of twelve men make partition between the parties, to hold to them in severalty, without any mention of preference to the eldest sister, &c. *Litt.* 248: 1 *Inst.* 164. But if there be a capital messuage on the land to be divided, the Sheriff must allot that wholly to the eldest of the Parceners. 1 *Inst.* 165.—The partition, made and delivered by the Sheriff and jurors, ought to be returned into Court under the seal of the Sheriff, and the seals of the twelve jurors; for the words of the judicial writ of partition, which command the Sheriff to make partition, are *Assumptis tecum duodecim, &c. et partitionem inde scire facias justiciariis, &c. sub sigillo tuo et sigillis eorum per quorum sacramentum partitionem illam feceris, &c.* If partition be made by force of the King's writ and judgment thereof given, it shall be binding to all parties, because it is made by the Sheriff, by the oath of twelve men, by authority of law; and the judgment is, that the partition shall remain firm and stable for ever. 1 *Inst.* 171.

Blackstone says, there are many methods of making partition, four of which are by consent, and one by compulsion; to which latter may now be added, or indeed for which may be substituted, the proceedings in a Court of Equity to obtain a decree for partition. See this Dictionary, title *Joint-tenants* III. 2.

The four modes of partition by consent are thus stated by *Blackstone*. The first is, where they agree to divide the lands into equal parts in severalty, and that each shall have such a determinate part.

The second is, when they agree to choose some friend to make partition for them, and then the sisters shall choose each of them her part, according to seniority of age; or otherwise, as shall be agreed. The privilege of seniority is in this case personal; for if the eldest sister be dead, her issue shall not choose first, but the next sister. But if an advowson descend in coparcenary, and the sisters cannot agree in the presentation, the eldest and her issue, nay, her husband, or her assigns, shall present alone, and before the younger. *Co. Litt.* 166: 3 *Rep.* 22. And the reason given is, that the former privilege, of priority in choice upon a division, arises from an act of her own, the agreement to make partition, and therefore is merely personal; the latter, of presenting to the living, arises from the act of law, and is annexed not only to her person, but to her estate also. It has been doubted whether the grantee of the eldest sister shall have the first and sole presentation after her death. *Harg. Co. Litt.* 166. But it was expressly determined in favour of such a grantee, in 1 *Ves.* 340. and see 1 *H. Blackst.* 412.

A third method of partition is, where the eldest divides, and then she shall choose last; for the rule of law is, *cujus est divisio alterius est electio*.

The fourth method is, where the sisters agree to cast lots for their shares.

But there are some things which are in their nature impartible. The mansion-house, common of estovers, common of piscary uncertain, or any other common without stint, shall not be divided; but the eldest sister, if she pleases, shall have them, and make the others a reasonable satisfaction in other parts of the inheritance; or if that cannot be, then they shall have the profit of the thing by turns in the same manner as they take the advowson. *Co. Litt.* 164, 165.

There is yet another consideration attending the estate in coparcenary; that if one of the daughters has had an estate given with her in *frankmarriage* by her ancestor, (which is a species of estate-tail, freely given by a Relation for advancement of his kinswoman in marriage,) in this case, if lands descend from the *same* ancestor to her and her sisters, in fee-simple, she or her heirs shall have no share of them, unless they will agree to divide the lands so given in *frankmarriage* in equal proportion with the rest of the lands descending. *Bract. l. 2. c. 34: Litt. § 266—273.* This is denominated bringing the lands into *hotch-pot*; *Britton, c. 72*; which term *Littleton, § 267, 8*, thus explains: "It seemeth that this word *hotch-pot* is, in *English*, a pudding; for in a pudding is not commonly put one thing alone, but one thing with other things together." By this housewifely metaphor our ancestors meant to inform us, that the lands, both those given in *frankmarriage* and those descending in fee-simple, should be mixed and blended together, and then divided in equal proportions among all the daughters. But this was left to the choice of the donee in *frankmarriage*; and if she did not choose to put her lands into *hotch-pot*, she was presumed to be sufficiently provided for, and the rest of the inheritance was divided among her other sisters. The law of *hotch-pot* took place then only, when the other lands descending from the ancestor were fee-simple; for if they descended in tail, the donee in *frankmarriage* was entitled to her share, without bringing her lands so given into *hotch-pot*. *Litt. § 274.* And the reason is, because lands descending in fee-simple are distributed by the policy of law, for the maintenance of all the daughters, and if one has a sufficient provision out of the same inheritance equal to the rest, it is not reasonable that she should have more; but lands descending in tail are not distributed by the operation of the law, but by the designation of the giver, *per formam doni*; it matters not therefore how unequal this distribution may be. Also no lands but such as are given in *frankmarriage* shall be brought into *hotch-pot*, for no others are looked upon in law as given for the advancement of the woman, or by way of marriage portion. *Litt. § 275.* And therefore, as gifts in *frankmarriage* are fallen into disuse, the law of *hotch-pot* would not now deserve much notice, had not this method of division been revived and copied by the statute for distribution of personal estates. See this Dictionary, title *Executor* V. 9.

The estate in coparcenary may be *dissolved*, either by partition, which disunites the possession; by alienation of one Parcener, which disunites the title, and may disunite the interest; or by the whole at last descending to and vesting in one single person, which brings it to an estate in severalty. See 2 *Comm. c. 12. ff. 189, &c.*

In a writ of partition, the judgment was *quod partitio fiat*; and before it was executed by the Sheriff, a writ of error was brought; and

it was adjudged that a writ of error doth not lie upon this first judgment, because this is not like other actions, where error lies before the *habere facias seisinam* is returned, and the judgment is final; but it is not so in this case, as there must be another judgment, *i. e. quod partitio stabilis maneat*, which cannot be till the partition is made, and returned by the Sheriff. *Hetley 36: Dyer 67.*

If there are two Parceners of a *manor*, and, on partition made, each hath demesnes and services allotted; in this case each is said to have a manor. 1 *Leon. 26: Davis 61.* A partition may not be made of franchises, as goods of felons, waifs, estrays, &c. which are casual. 5 *Rep. 3.*

Where two persons hold lands *pro indiviso*, and one would have his part in severalty, and the other refuseth to make partition by deed; there the writ *de partitione faciendâ* lies against him who refuses, directed to the Sheriff; and he *must be present* when the partition is made; and if it is objected before the return of the writ, that he was not present, he may be examined by the Court; but after the writ is returned and filed, it is too late. *Cro. Eliz. 9.*

A writ of partition was taken forth, and the Sheriff made partition, but was not upon the land; and on motion that the return might not be filed, but that a new writ might be awarded, because the Sheriff was not on the land, the Court staid the filing, and on examining the Sheriff, ordered a new writ. *Cro. Car. 9, 10.*

On writ of partition to the Sheriff to make partition of lands, part of the lands were allotted to one, and the jury would not assist the Sheriff to make partition of the other part; which appearing on the return of the writ, the Court was moved for an attachment against the jury, and a new writ to the Sheriff. *Godb. 265.* Partition was brought by tenant in fee of one moiety, against tenant for life of the other moiety, on the *stat. 32 Hen. 8. c. 32.* And though it has been resolved, if partition be made between one who hath an estate of inheritance, and another who hath a particular estate for life; that the writ ought to be framed upon the statute, and to be made special, setting forth the particular estate; yet it was held to be good where the writ was general. *Goldsb. 84: 2 Lutw. 1015.*

By *stat. 8 & 9 W. 3. c. 31*, a partition may be made of any estate of freehold, or for term of years, &c. of manors, lands, tenements, and hereditaments whereof the partition is demanded; and if after process of *pone* returned upon a writ of partition and affidavit of notice given of the writ to the tenant to the action, and a copy left with the tenant in possession at least forty days before the return of the said *pone*, &c. there be no appearance entered in fifteen days; the demandant having entered his declaration, the Court may give judgment by default, and award a writ to make partition, whereby the demandant's part or purpart will be set out severally; which writ being executed after eight days' notice, and returned, and thereupon final judgment entered, shall conclude all persons, &c. But the Court may suspend or set aside the judgment, if the party concerned move the Court in a year, and shew good matter in bar. And by this statute, if the High Sheriff, by reason of distance, &c. *cannot be present* at the execution of any judgment in partition, then the Undersheriff *in the presence of two justices of peace of the county*, shall proceed to the execution of the writ by inquisition, and the High Sheriff is to make the return, &c. When the partition is made and returned, the

persons who were tenants of the lands or any part thereof, before divided, shall continue tenants of the lands they held to the respective owners, under such conditions and rents as before; and no plea in abatement shall be admitted or received in any suit of partition; nor shall the same be abated by the death of any tenant, &c.

In a writ of partition the defendant pleaded, that he formerly brought writ of partition against the plaintiff, and had judgment to have partition: and held a good plea; but it was a question, whether it should be pleaded in bar or abatement, or by way of estoppel. *Dyer* 92. No damages can be recovered on a writ of partition, though the writ and declaration conclude *ad damnum*. *Hell.* 35: *Noy* 143.

Where judgment for debt is had against one Parcener, the lands, &c. of both may be taken in execution; and the moiety undivided is to be sold, and then the vendee will be tenant in common with the other Coparcener: if the Sheriff seize only a moiety and sell it, the other Parcener will have a right to a moiety of that money. 1 *Salk.* 392. All partitions ought to be according to the quality and true value of the lands, and be equal in value: but if partition be made by Parceners of full age, and unmarried, and *sane memoriae*, it binds them for ever, although the value be unequal, if it be made of lands in fee; and if it be of lands intailed, it shall bind the parties themselves for their lives, but not their issue, unless it be equal: if it be unequal, the issue of her who hath the lesser part, may, after her decease, disagree, and enter and occupy in common with the aunt; also if any be covert, it shall bind the husband, but not the wife, or her heirs; or if any be within age, it shall not bind the infant, but she may at her full age disagree, &c. 1 *Inst.* 166, 170: 2 *Lil. Abr.* 283. Though if a wife, after coverture, or the infant at her age, accept of the unequal part, they are concluded for ever. 1 *Inst.* 170. And where there be two Coparceners, and one hath seven daughters, and dieth; if the other Parcener releaseth to any one of the daughters her whole part, here, although she to whom the release is made, have not an equal part, the release is good. *Ibid.* 193. It hath been adjudged, that notwithstanding a partition is unequal, if it be by writ, it cannot be avoided; but if it be by deed, it may be avoided by entry. 1 *Inst.* 171.

If the estate of a parcener be in part evicted, that shall defeat the whole partition; partition implying a warranty and condition in law to enter upon the whole on eviction, as in case of exchange of lands. 1 *Inst.* 173: 1 *Rept.* 87. And if after partition, one of the parts is recovered from a Parcener by lawful title, she shall compel the others to make a new partition. *Cro. Eliz.* 902. But as to eviction of Parceners, if one sell her part, and then the part which the other Parcener hath, is evicted; in this case she who loseth her part, cannot enter on the alienee, for by alienation the privity is destroyed. 1 *Inst.* 173. Among Parceners, a partition upon the land may be good without deed; but not among joint-tenants, &c. *Dyer* 29, 194. See title *Joint-tenants*.

FORM of a common WRIT of PARTITION.

GEORGE the Third, &c. to the Sheriff of S. greeting: If A. B. make you secure, &c. then summon E. B. that she be before, &c. to shew wherefore, whereas the said A. B. and E. B. together and undivided hold the manor of, &c. with the appurtenances, twenty messuages,

one mill, one dovehouse, twenty gardens, three hundred acres of land, two hundred acres of meadow, a hundred and fifty acres of pastures, one hundred acres of wood, two hundred acres of furze and heath, and twenty shillings rent, with the appurtenances of the inheritance which was of N. B. father of the said A. B. and E. B. whose heirs they are, in &c. the said E. B. doth deny partition thereof to be made between them, according to the law and custom of England: and unjustly will not permit that to be done, as it is said: And have you there the summons and this writ. Witness, &c.

PARCENARY, The holding of lands jointly by Parceners, when the common inheritance is not divided. *Litt.* 56.

PARCHMENT, Is one of the articles liable to a duty of excise; and in case of deeds, &c. written on it, to stamps. See *Paper*.

PARCO FRACTO, A writ against him who violently breaks a pound, and takes out beasts from thence, which for some trespass done, &c. were lawfully impounded. *Reg. Orig.* 166. If a person hath authority to take beasts out of the pound, if he breaks the pound before he demands the cattle of the keeper thereof, and he refuseth or interrupts him in the taking of them, &c. the writ *Parco fracto* lies. *Dr. & Stud.* 112. Damages are recoverable in this writ; and the party may be punished, as for a pound-breach in the Court-leet. 1 *Inst.* 47: *R. N. B.* 100. The word *parcus* was frequently used for a pound to confine trespassing or straying cattle; whence *imparcare* to impound, *imparcatio* pounding, and *imparcamentum*, right of pounding, &c.

PARDON,

PARDONATIO; VENIA.] The remitting or forgiving of an offence committed against the King; and is either *ex gratiâ Regis*, or by course of law. *Staundf. Pl. Cor.* 47.

Pardon *ex gratiâ Regis* is that which the King affords by virtue of his prerogative. See this Dictionary, title *Judges*. Pardon by course of law is that which the law in equity affords for a light offence; as casual homicide, when one killeth a man, having no such meaning. *West. Symbol. par.* 2. title *Indictments*, § 46.

The power of pardoning offences is inseparably incident to, and is the most amiable prerogative of, the Crown; and this high prerogative the King is entrusted with upon a special confidence, that he will spare those only whose case, could it have been foreseen, the law itself may be presumed willing to have excepted out of its general rules; which the wisdom of man cannot possibly make so perfect as to suit every particular case. 1 *Show.* 284.

Antiently the right of pardoning offences, within certain districts, was claimed by lords, who had *jura regalia* by antient grants from the Crown, or by prescription. But by *stat.* 27 *H.* 8. *cap.* 24, it was enacted, "That no person shall have power to pardon any treasons or felonies, nor any accessories, nor outlawries; but that the King shall have the authority thereof, united to the Crown of this realm, as of right it appertaineth." *Co. Litt.* 114: 3 *Inst.* 233. And this power belongs only to a King *de facto*, and not to a King *de jure*, during the term of usurpation. *Bro. Abr.* title *Chamber de Pardon* 22.

The power of pardoning offences is stated by *Blackstone* to be one of the great advantages of Monarchy in general, above every other

form of government; and which cannot subsist in Democracies. Its utility and necessity are defended by him, on all those principles which do honour to human nature. See 4 *Comm. c. 31. p. 396, 7.*

He then proceeds to consider Pardons under the following heads; a distribution here followed, as most convenient:

- I. *The Object of Pardon; that is, in what Cases, and for what Offences, a Pardon may be granted; or not.*
- II. *The Manner of pardoning; wherein how far a Pardon is grantable of common Right; and by what Words Offences may be pardoned.*
- III. *The method of allowing a Pardon.*
- IV. *The effect of such Pardon when allowed.*

I. THE King may pardon all offences merely against the Crown, or the Public; excepting, 1; That, to preserve the liberty of the Subject, the committing any man to prison out of the realm is by the *habeas-corpus* act, *stat. 31 Car. 2. c. 2*, made a *premunire*, unpardonable even by the King. Nor, 2; Can the King pardon, where private justice is principally concerned in the prosecution of offenders: "*non potest rex gratiam facere cum injuriâ et damno aliorum.*" 3 *Inst.* 236. Therefore in criminal appeals of all kinds (which are the suit, not of the King, but of the party injured,) the prosecutor may release, but the King cannot pardon. *Ibid.* 237. Neither can he pardon a common nuisance, while it remains unredressed, or so as to prevent an abatement of it; though afterwards he may remit the fine; because though the prosecution is vested in the King to avoid multiplicity of suits, yet, during its continuance, this offence favours more of the nature of a private injury to each individual in the neighbourhood, than of a public wrong. 2 *Hawk. P. C. c. 37. § 33.* Neither, lastly, can the King pardon an offence against a popular or penal statute, after information brought; for thereby the informer hath acquired a private property in his part of the penalty. 3 *Inst.* 338.

There is also a restriction of a peculiar nature, that affects the prerogative of pardoning, in case of parliamentary impeachments; *viz.* that the King's Pardon cannot be *pleaded* to any such impeachment, so as to impede the inquiry, and stop the prosecution of great and notorious offenders. Therefore when, in the reign of *Charles II.* the Earl of *Danby* was impeached by the House of Commons of high treason, and other misdemeanors, and pleaded the King's Pardon in bar of the same, the Commons alleged, "that there was no precedent, that ever any Pardon was granted to any person impeached by the Commons of high treason, or other crimes *depending the impeachment;*" and thereupon resolved, "that the Pardon so pleaded was illegal and void; and ought not to be allowed *in bar* of the impeachment of the Commons of *England;*" for which resolution they assigned this reason to the House of Lords; "that the setting up a Pardon to be a *bar* of an impeachment, defeats the whole use and effect of impeachments; for should this point be admitted, or stand doubted, it would totally discourage the exhibiting any for the future; whereby the chief institution for the preservation of the Government would be destroyed." *Com. Journ.* 28th Apr. 1679: 5 May 1679: 26 May 1679. Soon after the Revolution the Commons renewed the same

claim, and voted, "that a Pardon is not *pleadable in bar* of an impeachment." And at length it was enacted by the Act of Settlement, *stat. 12 & 13 W. 3. c. 2*, "that no Pardon under the great seal of England, shall be *pleadable* to an impeachment by the Commons in Parliament." But, after the impeachment has been solemnly heard and determined, it is not understood that the King's royal grace is farther restrained or abridged; for, after the impeachment and attainder of the six rebel lords in 1715, three of them were from time to time reprieved by the crown, and at length received the benefit of the King's most gracious Pardon; and a remarkable record is cited by Mr. *Christian, Rot. Parl. 50 E. 3. n. 188*; in which it is asserted by the King, and acknowledged by the Commons, that the King's prerogative, to pardon delinquents *convicted* on impeachment, is as antient as the Constitution itself.

It is laid down in general, that the King may pardon any offence, so far as the public is concerned in it, after it is over, consequently may prevent a popular action on a statute, by pardoning the offence before the suit is commenced; but it seems, that he cannot wholly pardon a public nuisance, while it continues such, because such Pardon would take away the only means of compelling a redress; yet it is said, that such a Pardon will save the party from any fine, to the time of the Pardon. *Plowd. 487: Keilw. 134: 12 Co. 29, 30: 3 Inst. 237: Vaugh. 333.*

It seems agreed, that the King can by no previous licence, Pardon, or dispensation, make an offence *dispunishable*, which is *malum in se*; as being either against the law of nature, or so far against the public good as to be indictable at Common Law; and that a grant of this kind, tending to encourage the doing of evil, which it is the chief end of government to prevent, is against the common good, therefore void. *Dav. 75: 5 Co. 35: 13 Co. 29: Vide 2 Hawk. P. C. c. 37: 3 H. 7, 15, fol. 30.*

Where a thing, in its own nature lawful, was made unlawful by Parliament, it was formerly taken as a general rule, that the King might dispense with it, as to a particular time or place, or person, so far as the public was concerned in it; unless such dispensation could not but be attended with an inconvenience, as the introducing a monopoly; or frustrating the end for which the law was made; as the licensing a particular person to import foreign cards or wines, &c. in which case it was commonly taken to be void; also, where a statute gave a particular interest, or right of action to the party grieved, it was always agreed, that no charter from the King could bar the right of the party, grounded on such statute; also where a statute was express, that the King's charter against the purport of it, though with the clause of *non obstante*, should be void; it seems to have been always generally agreed, that regularly no such clause could dispense with it. *2 Hawk. P. C. c. 37. § 28.*

It seems to have been agreed, that no dispensation of any statute, except the statutes of mortmain, was of any force without a clause of *non obstante*; neither is such clause now of any effect, for it is declared and enacted by *stat. 1 W. & M. st. 2. c. 2*, that no dispensation by *non obstante* of or to any statute, or any part thereof, be allowed; but that the same shall be held void, except a dispensation be allowed in such statute; but it is provided, that no charter, grant, or Pardon, granted before the 23d of October 1699, shall be any ways in-

validated by that act, but that the same shall be and remain of the same force, and no other, as if the said act had never been made. See this Dictionary, titles *King*, V. 3.

The King cannot by any charter bar any right of entry or action, real or personal, on contract, or for wrong done, or any legal interest, or benefit before vested in the Subject; therefore it seems clear, that he cannot bar any action on a statute by the party grieved, nor even a popular action commenced before his Pardon, nor a recognizance for the peace before it is forfeited. *Plowd.* 487: 2 *Roll. Abr.* 178: *Cro. Car.* 199: *Keilw.* 134: *Moor* 863.

The power of the Crown to pardon a forfeiture, and to grant restitution, can only be exercised when things remain *in statu quo*, but not so as to affect legal rights vested in third persons. *Rex v. Amery*, 2 *Term Rep.* K. B. 569.

Neither can the King pardon an appeal, except only where it is carried on at his suit, after a nonsuit of the party; therefore if a person attainted, on an appeal carried on at the suit of the party, get the King's Pardon, he must sue a *scire facias* against the appellant, before the Pardon shall be allowed. And if the appellant appear on the *scire facias*, he may pray execution notwithstanding the Pardon; but if the Sheriff return a *scire feci*, or two *nihils*, and the appellant appear not, on demand, or if he return the appellant dead, the appellee shall be discharged; but some have holden, that in this last case, a *scire facias* shall go against the heirs of the deceased. 2 *Hawk. P. C.* c. 37. § 35, 36.

But there is no need of any *scire facias* against the lord by escheat; because the Pardon no way tends to reverse the attainder whereon the title of escheat is founded. 2 *Hawk. P. C.* c. 37. § 37.

It hath been strongly holden, that the King may pardon the burning of the hand, on a conviction of manslaughter, on an appeal, as being no part of the judgment at the suit of the party; but collateral and exemplary punishment inflicted by the statute, and intended only by way of satisfaction to public justice; like the finding of sureties by one convicted on the statute against trespass in parks. But for this see 2 *Hawk. P. C.* c. 37. § 39.

In an *appeal* in which the defendant was found guilty of *manslaughter*, it was doubted whether the King could pardon the burning in the hand, and the defendant compounded with the appellant for forty marks. 4 *Comm.* 317, *n.* cites 3 *P. Wms.* 453.

II. First, a Pardon must be under the great seal. A warrant under the privy seal, or sign manual, though it may be a sufficient authority to admit the party to bail, in order to plead the King's Pardon when obtained in proper form, yet is not of itself a complete irrevocable Pardon. 5 *St. Tr.* 166, 173.

Next, it is a general rule, that wherever it may reasonably be presumed that the King is deceived, the Pardon is void. 2 *Hawk. P. C.* c. 37. § 8. Therefore any suppression of truth, or suggestion of falsehood, in a charter of Pardon, will vitiate the whole; for the King was misinformed. 3 *Inst.* 238.

General words have also a very imperfect effect in Pardons. A Pardon of all felonies will not pardon a *conviction* or *attainder* of felony; for it is presumed the King knew not of those proceedings; but the conviction or attainder must be particularly mentioned. 2 *Hawk.*

P. C. c. 37. § 8. And a Pardon of felonies will not include piracies; for that is no felony punishable at the Common Law. 1 *Hawk. P. C. c. 37. § 6, &c.*

It is also enacted by *stat. 13 R. 2. st. 2. c. 1*, that no Pardon for treason, murder, or rape, shall be allowed, unless the offence be particularly specified therein; and particularly in murder it shall be expressed, whether it was committed by laying in wait, assault, or malice prepense. Upon which *Coke* observes, that it was not the intention of the Parliament that the King should ever pardon murder, under these aggravations; and therefore they prudently laid the Pardon under these restrictions, because they did not conceive it possible that the King would ever excuse an offence by name, which was attended with such high aggravations. 3 *Inst.* 236. And it is remarkable enough, that there is no precedent of a Pardon in the register for any other homicide, than that which happens *se defendendo*, or *per infortunium*; to which two species the King's Pardon was expressly confined by the *stats. 2 E. 3. c. 2*; and *14 E. 3. c. 15*; which declare that no Pardon of homicide shall be granted, but only where the King may do it *by the oath of his Crown*, that is to say, where a man slayeth another in his own defence, or by misfortune. But the *stat. 13 Ric. 2. st. 2. c. 1*, before mentioned, enlarges by implication the royal power; provided the King is not deceived in the intended object of his mercy. And therefore Pardons of murder were always granted with a *non obstante* of the statute of King *Richard*, till the time of the Revolution; when the doctrine of *non obstantes* ceasing, it was doubted whether murder could be pardoned generally; but it was determined by the Court of King's Bench, that the King may pardon on an indictment of murder, as well as a subject may discharge an appeal. *Salk.* 499. Under these and a few other restrictions, it is a general rule, that a pardon shall be taken most beneficially for the Subject, and most strongly against the King.

A Pardon may also be *conditional*; that is, the King may extend his mercy upon what terms he pleases; and may annex to his bounty a condition either precedent or subsequent, on the performance whereof the validity of the Pardon will depend; and this by the Common Law. 2 *Hawk. P. C. c. 37. § 45.* Which prerogative is daily exerted in the Pardon of felons, on condition of being confined to hard labour for a stated time; or of transportation to some foreign country for life, or for a term of years; such transportation or banishment being allowed and warranted by the *habeas-corpus* act, 31 *Car. 2. c. 2. § 14*; and both the imprisonment and transportation rendered more easy and effectual by *stats. 8 Geo. 3. c. 15*; 19 *Geo. 3. c. 74*; 24 *Geo. 3. c. 56*; 31 *Geo. 3. c. 46*. See this Dictionary, title *Transportation*.

By the statute of *Gloucester*, 6 *E. 1. cap. 9*, it is enacted, "That if it be found by the country, that a person tried for the death of a man, did it in his defence, or by misfortune, then, by the report of the justices to the King, the King shall take him to his grace, if it please him." 2 *Inst.* 316.

But it seems to be settled at this day, agreeable to the antient Common Law, in affirmance whereof this statute was made, that in such a case, or where one indicted of homicide *se defendendo* confesses the indictment, if the party cause the record to come into Chancery, the Chancellor will of course make him a Pardon, without speaking to the King, and that by such Pardon the forfeiture of goods may be

saved; for these words, "If it shall please the King," shall be taken as spoken only by way of reverence to him, and not intended to make such a Pardon discretionary. But if the party be found to have fled, it is made a *quære*, if the Pardon save the forfeiture of the flight, for that is not grounded on the homicide, but on the contempt of law. 2 *Hawk. P. C. c. 37. § 2.*

If an approver convict all the appellees, whether by battel or verdict, the King, *ex merito justitiæ*, ought to pardon him as to his life, and also give him his wages from the time of appeal, to the time of conviction. 3 *Inst. 139*; 2 *Hawk. P. C. c. 25. § 27*; 2 *Hale's Hist. P. C. 233.*

As to persons entitled to pardons on discovering their accomplices, see *stats. 4 & 5 W. & M. c. 8*; 6 & 7 *W. & M. c. 17*; 10 & 11 *W. 3. c. 23*; 5 *Ann. c. 31, &c.*; and this Dictionary, titles *Accessaries*; *Receivers*.

It has been already mentioned as a general rule, that wherever it appears, by the recital of the Pardon, that the King was misinformed, or not rightly apprized, both of the heinousness of the crime, and also how far the party stands convicted upon record, the Pardon is void, upon a presumption that it was gained from the King by imposition. See also *Yel. 43, 47*; *Cro. Jac. 18, 34, 548*; 2 *Roll. Abr. 188*; *Dyer 352. pl. 26*; *Raym. 13*; 1 *Sid. 41*; 3 *Inst. 338*. And on this ground it hath been holden, that the Pardon of a person convicted by verdict of felony, is void unless it recite the indictment and conviction; also it hath been questioned, if the Pardon of a person barely indicted of felony be good, without mentioning the indictment; but it hath been adjudged, that such a defect is saved by the words *sive indictatus sive non*. 2 *Hawk. P. C. c. 37. § 8.*

Antiently a Pardon of all felonies included all treasons as well as felonies; and it seems to be taken for granted in many books, that such a general Pardon is, even at this day, pleadable to any felony, except murder, rape, and piracy; and that the only reason why it may not also be pleaded to murder and rape is, because *stat. 13 Rich. 2. st. 2. c. 1.* requires an express mention of them; and that the only reason why it is not pleadable to piracy is because it is a felony by the Civil Law. 1 *Hale's Hist. P. C. 466*; 2 *Hale's Hist. P. C. 45*; See *ante*; and 2 *Hawk. P. C. c. 37. § 9.*

No pardon of felony shall be carried beyond the express purport of it; therefore if the King reciting an attainder of robbery, pardon the execution, he thereby neither pardons the felony itself, nor any other consequence of it, besides the execution. 6 *Co. 13*; 2 *Hawk. P. C. c. 37. § 12.*

It was formerly adjudged, that murder might be pardoned under the general description of a felonious killing, with a clause of *non obstante*. 1 *Sid. 366*; 1 *Show. 283*; *Keling 24*; 3 *Mod. 37*. And Pardons of manslaughter still remain as they were at Common Law before the doctrine of *non obstante* was exploded; therefore the Pardon of the felonious killing of *J. S.* may be pleaded to an indictment of manslaughter in killing him; but where such a Pardon is pleaded to a coroner's inquest of manslaughter, the Court may refuse to allow it, till the fact be found manslaughter by a jury directed by a higher Court. 2 *Keb. 363, 415*; *Keling 24*; 2 *Jon. 56.*

If a general act expressly pardon petit treason, and except murders, it cannot be avoided by indicting a person guilty of petit treason

for murder only, omitting the word *proditoriè*; for the less offence being included in the greater is pardoned by the Pardon of it; therefore such an exception of murder is to be intended of such murder only as is specially so called, and doth not amount to petit treason. *Dyer* 50. *fil.* 4: 235. *fil.* 19: 6 *Co.* 13.

Neither doth the exception of murder, in a general act of Pardon of all felonies, extend to *felo de se*: for though this offence be in strictness murder, yet in common speech, according to which statutes are commonly expounded, it is generally understood as a distinct offence, the word murder seeming *primâ facie* to import the murder of another. 1 *Lev.* 8, 120: 1 *Sid.* 150: 1 *Keb.* 66, 548.

It is said that a general act of Pardon of all felonies, misdemeanors, and other things done before such a day, pardons a homicide from a wound before the day, whereof the party died not till after; because the stroke being pardoned, the effects of it are consequently pardoned. *Plowd.* 401, *Cole's case*: 1 *Hale's Hist. P. C.* 426: *Dyer* 99. *fil.* 65.

It is said, that a Pardon of all misprisions, trespasses, offences, and contempts, will pardon a contempt in making a false return, and a striking in *Westminster-Hall*, and barratry, and even a *præmunire*; also it is laid down in general, that it will pardon any crime not capital. 1 *Lev.* 106: 1 *Sid.* 211: 2 *Mod.* 52: *vide* 2 *Hale's Hist. P. C.* 252: *Dyer* 308. *a.*

III. A PARDON by act of Parliament is more beneficial than by the King's charter; for a man is not bound to plead it, but the Court must, *ex officio*, take notice of it. *Fost.* 43. Neither can a man lose the benefit of it by his own *laches* or negligence, as he may of the King's charter of Pardon. 2 *Hawk. P. C. c.* 37. § 64. The King's charter of Pardon must be specially pleaded, and that at a proper time; for if a man is indicted, and has a Pardon in his pocket, and afterwards puts himself upon his trial by pleading the general issue, he has waived the benefit of such Pardon. *Ibid.* § 59. But if a man avails himself thereof, as soon as by course of law he may, a Pardon may either be pleaded upon arraignment, or in arrest of judgment, or in the present stage of proceedings, in bar of execution. By *stat.* 10 *E.* 3. *c.* 2. no Pardon of felony could be allowed, unless the parties found six sureties for their good behaviour before the Sheriff and Coroners of the county. *Salk.* 499. But that statute is repealed by the *stat.* 5 & 6 *W. & M. c.* 13; which, instead thereof, gives the judges of the Court a discretionary power to bind the criminal pleading such Pardon, to his good behaviour, with two sureties, for any term not exceeding seven years. See title *Larceny*.

A Pardon, if pleaded, must be averred to be under the Great Seal: except a Statute Pardon, or what amounts thereto. 1 *Bos. & Pul.* 199.

IV. THE effect of such Pardon by the King is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offence, for which he obtains his Pardon; and not so much to restore his former, as to give him a new credit and capacity. But nothing can restore or purify the blood when once corrupted, if the Pardon be not allowed till after attainder, except the high and transcendant power of Parliament. Yet if a person attainted re-

ceives the King's Pardon, and afterwards hath a son, that son may be heir to his father, because the father, being made a new man, might transmit new inheritable blood; though had he been born before the Pardon, he could never have inherited at all. See title *Attainder*.

A Pardon will not only discharge any suit in the Spiritual Court *ex officio*, but also any suit in such Court *ad instantiam partis pro reformatione morum*, or *salute animæ*; as for defamation, or laying violent hands on a clerk, &c. See 5 Co. 51: *Latch.* 190: *Cro. Eliz.* 684: *Hob.* 81: *Cro. Jac.* 335: 2 *Hawk. P. C. c.* 37. § 41, &c.

If a person be imprisoned on an *excommunicato capiendo* for non-payment of costs, and the King pardons all contempts, it is said, that he shall be discharged without any *scire facias* against the party, and that the party must begin anew to compel payment of costs; because the imprisonment was grounded on the contempt, which is wholly pardoned. 1 *Jon.* 227: 2 *Roll. Abr.* 178: *Cro. Jac.* 159: 8 Co. 68, 69.

But no Pardon will discharge a suit in the Spiritual Court, any more than in a temporal, for a matter of interest or property in the plaintiff; as for tithes, legacies, matrimonial contracts, and such like; also it is agreed, that after costs are taxed in a suit, in such Court, at the prosecution of the party, whether for a matter of private interest, or *pro reformatione morum*, or *pro salute animæ*, or for defamation, &c. they shall not be discharged by a subsequent Pardon. 5 Co. 51: *Latch.* 190: *Cro. Car.* 46, 7. And with respect to costs, see 2 *Roll. Abr.* 304. *Noy* 85; *Latch.* 155.

For more learning on this subject, see 3 *New Abr.* title *Pardon*.

PARDONERS, Persons who carried about the Pope's indulgences, and sold them to any who would buy them. *Ann.* 22 H. 8.

PARENT, [*parens*.] A father or mother; but generally applied to the father; Parents have power over their children by the law of nature, and the divine law; and by those laws they must educate, maintain, and defend their children. *Wood's Inst.* 63. The Parent or father hath an interest in the profits of the children's labour while they are under age, if they live with and are maintained by him; but the father hath no interest in the estate of a child, otherwise than as his guardian. *Ibid.* The eldest son is heir to his father's estate at Common Law; and if there are no sons, but daughters, the daughters shall be heirs, &c. And there being a reciprocal interest in each other, Parents and children may maintain the suits of each other, and justify the defence of each other's person. 2 *Inst.* 564.

A Parent may lawfully correct his child being under age in a reasonable manner: for this is for the benefit of his education. The consent or concurrence of the Parent to the marriage of a child under age is necessary: but these and all other powers of a Parent cease in law, when a child arrives at the age of twenty-one. See 1 *Comm. c.* 16. and this Dictionary, titles *Age*; *Bastard*; *Poor*; *Marriage*; *Guardian*; and other apposite titles.

PARENTELA, or DE PARENTELA SE TOLLERE, To renounce his kindred, which was done in open Court before the Judge and in the presence of twelve men, who made oath, that they believed it was done lawfully, and for a just cause. We read it in the laws of H. 1. *cap.* 88. See *Vill.*

PARISH, [*parochia*.] Did antiently signify what we now call the diocese of a bishop: but at this day it is the circuit of ground in which the people who belong to one church do inhabit, and the particular

charge of a secular priest. It is derived from the *Saxon* *Pneortscype* *Preost scyre*; which signifies the precinct of which the priest had the care, in *English* priest-shire.

How antient the division of parishes is, may at present be difficult to ascertain; for it seems to be agreed on all hands, that in the early ages of Christianity in this island, Parishes were unknown, or at least signified the same that a diocese does now. There was then no appropriation of ecclesiastical dues to any particular church: but every man was at liberty to contribute his tithes to whatever priest or church he pleased, provided only that he did it to some: or, if he made no special appointment or appropriation thereof, they were paid into the hands of the bishop, whose duty it was to distribute them among the clergy, and for other pious purposes, according to his own discretion. 1 *Comm. Introd.* § 4.

Camden (in his *Britannia*) says, *England* was divided into Parishes by archbishop *Honorius* about the year 630. Sir *Henry Hobart* lays it down, that Parishes were first erected by the council of *Lateran*, which was held *anno Domini* 1179. Each widely differing from the other, and both of them perhaps from the truth; which will probably be found in the medium between the two extremes. For Mr. *Selden* has clearly shewn, (of *Tithes*, c. 9.) that the clergy lived in common without any division of Parishes, long after the time mentioned by *Camden*. And it appears from the *Saxon* laws that Parishes were in being long before the date of that council of *Lateran*, to which they are ascribed by *Hobart*. 1 *Comm. ubi sup.*

We find the distinction of Parishes, nay, even of mother churches, so early as in the laws of King *Edgar*, about the year 970. Before that time the consecration of tithes was in general arbitrary; that is, every man paid his own (as before observed) to what church or Parish he pleased. But this being liable to be attended with either fraud, or at least caprice, in the persons paying, and with either jealousies or mean compliances in such as were competitors for receiving them; it was ordered by the law of King *Edgar*, (c. 1.) That "*dentur omnes decimæ primariæ ecclesiæ ad quam parochia pertinet.*" However, if any thane, or great lord, had a church within his own demesnes, distinct from the mother church, in the nature of a private chapel; then, provided such church had a cemetery or consecrated place of burial belonging to it, he might allot one third of his tithes for the maintenance of the officiating minister: but, if it had no cemetery, the thane must himself have maintained his chaplain by some other means; for in such case all his tithes were ordained to be paid to the *primariæ ecclesiæ* or mother church. 1 *Comm. ubi sup.*

This proves that the kingdom was then universally divided into Parishes; which division happened probably not all at once, but by degrees. For it seems pretty clear and certain, that the boundaries of Parishes were originally ascertained by those of a manor or manors: since it very seldom happens that a manor extends itself over more Parishes than one, though there are often many manors in one Parish. But at present the boundaries of the one afford no inference or evidence whatever of the boundaries of the other. The lords, as Christianity spread itself, began to build churches upon their own demesnes or wastes, to accommodate their tenants in one or two adjoining lordships; and, in order to have divine service regularly performed therein, obliged all their tenants to appropriate their tithes to the maintenance of the one officiating minister, instead of leaving them

at liberty to distribute them among the clergy of the diocese in general: and this tract of land, the tithes whereof were so appropriated, formed a distinct Parish: which will account well enough for the frequent intermixture of Parishes one with another. For if a lord had a parcel of land detached from the main of his estate, but not sufficient to form a Parish of itself, it was natural for him to endow his newly-erected church with the tithes of those disjointed lands; especially if no church was then built in any lordship adjoining to those outlying parcels. Thus Parishes were gradually formed, and Parish churches endowed with the tithes that arose within the circuit assigned. But some lands, either because they were in the hands of irreligious and careless owners, or were situate in forests and desert places, or for other now unsearchable reasons, were never united to any Parish, and therefore continue to this day extraparochial; and their tithes are now by immemorial custom payable to the King instead of the bishop, in trust and confidence that he will distribute them for the general good of the church. 2 *Inst.* 647: 2 *Rep.* 44: *Cro. Eliz.* 512. Yet extraparochial wastes and marsh lands when improved and drained, are by the statute 17 *Geo.* 2. c. 37. to be assessed to all parochial rates in the Parish next adjoining. 1 *Comm. ubi sup.* and see 1 *Wils.* 182.

Lord *Holt* held, that Parishes were instituted for the ease and benefit of the people, not of the parson; and the reason why parishioners must come to their Parish church is, because having charged himself with the cure of their souls, he might be enabled to take care of that charge. 3 *Salk.* 88, 89. A Parish may comprise many vills; but generally it shall not be accounted to contain more than one, except the contrary be shewn, because most Parishes have but one vill within them. *Hil.* 23 *Car.* 1. *B. R.* And it shall not be intended that there is more than one Parish in a city, if it be not made to appear; for some cities have but one Parish. *Ibid.* Where there are several vills in a Parish, they may have peace-officers, and overseers of the poor, for every particular vill: and an antient vill in a Parish, that time out of mind hath had a church of its own, and churchwardens and parochial rights, being reputed a Parish, is a Parish within the *stat.* 43 *Eliz.* c. 2. to provide for its own poor; and shall not pay to the poor of the Parish wherein it lies. *Cro. Car.* 92, 384, 396. But to make a vill a reputed Parish within *stat.* 43 *Eliz.* c. 2. it must have a parochial chapel, chapelwardens and sacraments at the time that statute was made. 2 *Salk.* 501. Parishes in reputation are within that statute, especially when it has been the constant usage of such Parishes to choose their own overseers; who may distrain for a poor-tax, &c. 2 *Roll. Rep.* 160: 2 *Nels. Abr.* 1235. See titles *Poor; Overseers; Vill.*

Money given by will to a Parish, shall be to the poor of the Parish. *Chanc. Rep.* 134. If a highway lie in a Parish, the Parish is obliged to repair it; and it is the most convenient and equal for the parishioners in every Parish, to repair the ways within it, if they are able. 2 *Lil.* 272. See title *Highways.*

PARISH-CLERK. In every parish the parson, vicar, &c. hath a Parish Clerk under him, who is the lowest officer of the church. They were formerly clerks in orders, and their business was at first to officiate at the altar, for which they had a competent maintenance, by offerings; but now they are laymen, and have certain fees with the parson, on christenings, marriages, burials, &c. besides wages, for their maintenance. *Count. Pars. Complan.* 83, 84. They are to be twenty years

of age at least, and known to be of honest conversation, sufficient for their reading, singing, &c. And their business consists chiefly in responses to the minister, reading lessons, singing psalms, &c. And in the large parishes of *London* some of them have deputies, to despatch the business of their places, which are more gainful than common recitories. The law looks upon them as officers for life; they are regarded by the Common Law as persons who have freeholds in their offices; and therefore though they may be punished, yet they cannot be deprived, by ecclesiastical censures. 1 *Comm.* 395. And they are generally appointed by the minister, unless there is a custom for the parishioners or churchwardens to choose them; in which case the canon cannot abrogate such custom; and when chosen it is to be signified to, and they are to be sworn into their office by, the archdeacon. *Cro. Cur.* 589; *Can.* 91. And if such custom appears, the Court of *B. R.* will grant a *Mandamus* to the archdeacon to swear him in, for the establishment of the custom turns it into a temporal or civil right. 1 *Comm.* 395. He may make a deputy without licence of the Ordinary; *Strange* 942; and cannot sue in the Spiritual Court for fees as being a temporal officer. 2 *Strange* 1108.

PARISHIONER, [*parochianus*.] An inhabitant of or belonging to any parish, lawfully settled therein. Parishioners are compellable to put things in decent order; but the judgment of the majority is the only rule for the degrees of that decency; and the Court inclined that a rate for that purpose is binding; as for moving the communion-table out of the body of the church into the chancel, or raising it higher, &c. 7 *Mod.* 70.

Parishioners have a right to view parish books. 11 *Mod.* 134.

Parishioners are a body politic to many purposes; as to vote at a vestry if they pay scot and lot; and they have a sole right to raise taxes for their own relief, without the interposition of any superior Court; may make by-laws to mend the highways, and to make banks to keep out the sea, and for repairing the church, and making a bridge, &c. or any such thing for the public good: and by *stat.* 3 & 4 *W. 3. c.* 11. to tax and levy poor-rates, and to make and maintain fire-engines; and by *stat.* 9 *Geo. 1. c.* 28. for purchasing workhouses for the poor. *Arg. 8 Mod.* 354. See further, titles *Churchwardens*; *Overseers*; *Poor*; *Vestry*.

PARISH OFFICERS. Divers persons are exempted from serving parish offices on account of their professions, *viz.* Physicians and surgeons, apothecaries, dissenting teachers, and persons having prosecuted any felon to conviction, &c. See this Dict. titles *Churchwardens*; *Constable*; *Reward*.

PARK, Lat. *parcus*, Fr. *parque*, i. e. *locus inclusus*.] A large quantity of ground inclosed and privileged for wild beasts of chase, by the King's grant or by prescription. 1 *Inst.* 233.

Manwood defines a Park to be a privileged place for beasts of venary, and other wild beasts of the forest and chase, *tam sylvestres, quam campestris*: and differs from a chase or warren, in that it must be inclosed; for if it lies open, it is good cause of seizure into the King's hands, as a thing forfeited; as a free chase is, if it be inclosed; besides, the owner cannot have an action against such as hunt in his Park, if it lies open. *Manw. Forest Laws*; *Cromb. Jurisd.* 148. No man can erect a Park without licence under the broad seal; for the Common Law does not encourage matter of pleasure, which brings no profit to the commonwealth. But there may be a Park in reputation,

erected without lawful warrant; and the owner may bring his action against persons killing his deer. *Wood's Inst.* 207.

To a Park three things are required: 1. A grant thereof; 2. Inclosures by pale, wall, or hedge; 3. Beasts of a Park, such as the buck, doe, &c. And where all the deer are destroyed, it shall no more be accounted a Park; for a Park consists of vert, venison, and inclosure; and if it is determined in any of them, it is a total disparking. *Cro. Car.* 59, 60.

The King may by letters patent dissolve his Park. 2 *Lil. Abr.* 273.

Parks as well as chases are subject to the Common Law, and are not to be governed by the forest laws. 4 *Inst.* 314.

Pulling down Park walls or pales, the offenders shall be liable to the same penalty as for killing deer, &c. See *Deer-stealers*.

A *Park*, says *Blackstone*, is an inclosed chase extending only over a man's own grounds. The word *Park*, indeed, properly signifies an inclosure; but yet it is not every field or common which a gentleman pleases to surround with a wall or paling, and to stock with a herd of deer, that is thereby constituted a legal Park; for the King's grant, or at least immemorial prescription, is necessary to make it so. 1 *Inst.* 233; 2 *Inst.* 199; 11 *Repl.* 86. Though now the difference between a real Park, and such inclosed grounds, is in many respects not very material; only that it is unlawful, at *Common Law*, for any person to kill any beasts of Park or chase, except such as possess the franchises of forest, chase, or Park. 2 *Comm. c.* 3. *p.* 38. But this latter doctrine is strenuously combated by Mr. *Christian* in his *Annotations on the Commentaries*. See this Dictionary, title *Game*; as also titles *Forest*; *Chase*; *Warren*, &c.

PARK-BOTE, Signifies to be quit of inclosing a Park, or any part thereof. 4 *Inst.* 308.

PARLE HILL, *Spelman* gives this description of it; *Collis valles plerumque munitus, in loco campestri, ne insidiis exponatur; ubi convenire olim solebant centuriæ aut vicine incolæ ad lites inter se tractandas & terminandas: Scotis reor Grith hail, q. Mons pacificationis, cui asyli privilegia concedebantur: & in Hibernia frequentes vidimus, the Parle and Parling Hills.* *Spelm. Gloss.*

PARLIAMENT.

PARLIAMENTUM. The derivation of the word is uncertain; and its *etymon*, if we were to follow the imaginations of various authors, subject even to some degree of ridicule. It seems properly to be derived from the French *Parler*, to speak. Freedom of speech being of the essence of representation, and without which such a National Council can have no effect. The word (which was first applied to general assemblies of the States under *Louis VII.* in *France*, about A. D. 1150,) was not used in *England* till the reign of *Hen. III.* and the first mention of it, in our statute law, is in the preamble to *stat. Westm.* 1. 3 *Ed.* 1. A. D. 1272. When therefore it is said *Parliaments* met before that æra, it is by a licence of speech considering every national assembly as a Parliament. See 1 *Comm. c.* 2. *p.* 147; and the notes there.] Parliament may be defined to be

THE LEGISLATIVE BRANCH of the Supreme Power of GREAT BRITAIN; consisting of the King, the Lords Spiritual and Temporal; and the Knights, Citizens, and Burgesses, Representatives of the Commons of the Realm; in Parliament assembled.

- I. *Of the Antiquity and Origin of Parliament.*
- II. *The Manner and Time of its assembling.*
- III. *Its constituent Parts.*
- IV. *The Laws and Customs of Parliament as an aggregate Body.*
 1. *As relates to its Power and Jurisdiction.*
 2. *As relates to the Privileges of its Members; and see this Dict. titles Peers; Privilege.*
- V. *The Laws and Customs of the House of LORDS.*
 1. *As Members of Parliament.*
 2. *In their Judicial Capacity; and see ante IV. 1; and this Dict. titles Peers; Privilege.*
- VI. *The Laws and Customs of the House of COMMONS.*
 - (A) *As relates to levying Taxes.*
 - (B) *As relates to Election of Members to serve in Parliament.*

And herein,

 1. *Of the Qualifications of Electors;*
(a) *in Counties; (b) in Cities, &c.*
 2. *Of the Qualifications of the Elected.*
 3. *Proceedings at Elections; wherein of the Duty of returning Officers, and Proceedings, before Election-Committees.*
- VII. *The Method of Business, and particularly in the passing of Statutes in both Houses; and see this Dictionary, title Statute.*
- VIII. *Of the Adjournment, Prorogation, and Dissolution of Parliaments.*

I. SOME authors say, that the antient Britons had no such assemblies, but that the Saxons had: which may be collected from the laws of King Ina, who lived about the year 712. And William the First, called the Conqueror, having divided this land among his followers, so that every one of them should hold their lands of him *in capite*, the chief of these were called *Barons*, who thrice every year assembled at the King's Court, viz. at *Christmas, Easter, and Whitsuntide*, among whom the King used to come in his royal robes, to consult about the public affairs of the kingdom. This King called several Parliaments, wherein it appears, that the freemen or Commons of *England* were also there, and had a share in making laws: he by settling the Court of Parliament so established his throne, that neither *Briton, Dane, nor Saxon* could disturb his tranquillity, the making of his laws were by act of Parliament, and the accord between *Stephen* and him was made by Parliament; though all the times since have not kept the same form of assembling the States. *Doddridge's Antiq. Parliament.*

There was a Parliament before there were any barons; and if the Commons do not appear, there can be no Parliament; for the knights, citizens, and burgesses represent the whole Commons of *England*, but the peers only are present for themselves, and none others. *Doddr.*

Coke affirms, that many Parliaments were held before the Conquest; and produces an instance of one held in the reign of *Alfred*: he likewise gives us a conclusion of a Parliament holden by *Athlestan*, where mention is made, that all things were enacted in the great synod, or council at *Grately*, whereat was archbishop *Wolfehelme*, with all the noblemen and wise men, whom the King called together. 1 *Inst.* 110. It is apparent, (says Mr. *Prynne*,) from all the precedents before the time of the Conquest, that our pristine synods and councils were nothing else but Parliaments; that our Kings, nobles, senators, aldermen, wise men, knights and Commons, were present and voting in them as members and judges: And Sir *Henry Spelman*, *Camden*, and other writers, prove the Commons to be a part of the Parliament in the time of the *Saxons*, but not by that name, or elected as consisting of knights, citizens, and burgesses. *Pryn*, *Sovereign Pow. Parliament*.

As to the origin of the present House of Commons, our authors of antiquity vary very much; many are of opinion that the Commons began not to be admitted as part of the Parliament, upon the footing they are now, until the 49 *H.* 3. because the first writ of summons of any knights, citizens, and burgesses, is of no antienter date than that time. But the Great Charter in the 17th year of King *John*, (about which time the distinction of *barones majores* and *minores* is supposed to have begun,) was made *per Regem, barones, & liberos homines totius regni*.

Selden says, that the borough of *St. Albans* claimed by prescription in the Parliament, 8 *Ed.* II. to send two burgesses to all Parliaments, as in the reigns of *Edw.* I. and his progenitors, which must be the time of King *John*; and so before the reign of King *Henry* II. And in the reign of *Henry* V. it was declared and admitted, that the Commons of the land were ever a part of the Parliament. *Selden's Tit. Hon.* 709: *Polydore Virgil Hollinshed*, *Speed*, and others mention that the commons were first summoned at a Parliament held at *Salisbury*, 16 *Hen.* I. Sir *Walter Raleigh*, in his treatise of the *Prerogative of Parliaments*, thinks it was anno 18 *Hen.* I. And Dr. *Heylin* finds another beginning for them, viz. in the reign of King *Hen.* II.

On this part of the subject *Blackstone* thus expresses himself; and in his Commentaries will be found, as on other subjects, the summary of former opinions, illuminated by the powerful mind of that great Commentator. See 1 *Comm.* c. 2.

The original, or first institution, of Parliaments is one of those matters which lie so far hidden in the dark ages of antiquity, that the tracing of it out is a thing equally difficult and uncertain. But it is certain, that long before the introduction of the *Norman* language into *England*, all matters of importance were debated and settled in the great councils of the realm; a practice which seems to have been universal among the northern nations; particularly the *Germans*, and carried by them into all the countries of Europe, which they overran at the dissolution of the *Roman Empire*.

With us in *England* this general council hath been held immemorably, under the several names of *Michel Synoth*, or great council; *Michel Gemote*, or great meeting; and more frequently *Wittena Gemote*, or the meeting of wise men. It was also styled in Latin, *Commune concilium regni*; *Magnum concilium*; *Regis curia magna*; *Conventus magnatum, vel procerum*; *Assisa generalis*; and sometimes *Communitas regni Angliæ*. *Glan.* l. 13. c. 32: l. 9. c. 10: *Pref.* 9 *Repts*:

2 *Inst.* 526. We have instances of its meeting to order the affairs of the kingdom, to make new laws, and to mend the old; or as *Fleta* l. 2. c. 2. expresses it, "*novis injuriis emersis nova constituere remedia*;" so early as the reign of *Ina*, King of the *West Saxons*; *Offa*, King of the *Mercians*; and *Ethelbert*, King of *Kent*, in the several realms of the heptarchy. And, after their union, the *Mirror*, c. 1. § 3. informs us, that King *Alfred* ordained for a perpetual usage, that these councils should meet twice in the year, or oftener, if need be, to treat of the government of God's people; how they should keep themselves from sin, should live in quiet, and should receive right. Our succeeding *Saxon* and *Danish* monarchs held frequently councils of this sort, as appears from their respective codes of laws; the titles whereof usually speak them to be enacted, either by the King with the advice of his *Wittena-gemote*, or wise men, as "*hæc sunt instituta, quæ Edgarus rex consilio sapientum suorum instituit*;" or to be enacted by these sages with advice of the King, as, "*hæc sunt judicia, quæ sapientes consilio regis Ethelstani instituerunt*;" or lastly, to be enacted by them both together, as, "*hæc sunt institutiones, quas rex Edmundus, et episcopi sui, cum sapientibus suis instituerunt*."

There is also no doubt but these great councils were occasionally held under the first princes of the *Norman* line. *Glanvil*, who wrote in the reign of *Henry II.* speaking of a particular amount of an amercement in the Sheriff's Court, says, it had never yet been ascertained by the General Assises or Assembly, but was left to the custom of particular counties. *Glanv.* l. 9. c. 10. Here the general assise is spoken of as a meeting well known, and its statutes or decisions are put in a manifest contradistinction to custom, or the common law. And in *Edward III.*'s time, an act of Parliament, made in the reign of *William the Conqueror*, was pleaded in the case of the abbey of *St. Edmund's Bury*, and judicially allowed by the Court. *Year-Book*, 21 *E. 3.* c. 60.

Hence it indisputably appears, that Parliaments or general councils are coeval with the kingdom itself. How those Parliaments were constituted and composed is another question, which has been matter of great dispute among our learned antiquaries; and particularly whether the Commons were summoned at all; or if summoned, at what period they began to form a distinct assembly. It is however generally agreed, that in the main the constitution of Parliament, as it now stands, was marked out so long ago as the seventeenth year of King *John*, A. D. 1215, in the great charter granted by that prince; wherein he promises to summon all archbishops, bishops, abbots, earls, and greater barons, personally; and all other tenants in chief under the Crown, by the sheriff and bailiffs; to meet at a certain place, with forty days' notice, to assess aids and scutages, when necessary. And this constitution has subsisted, in fact, at least from the year 1266, 49 *Hen. III.*; there being still extant writs of that date, to summon knights, citizens, and burgesses to Parliament; the former of which may be seen in *Elsynge*, c. 1. § 2.

In fine, Parliament is the highest and most honourable, and absolute court of justice in *England*; consisting of the King, the Lords of Parliament, and the Commons; The Lords being divided into spiritual and temporal; and the Commons divided into knights of shires or counties; citizens out of cities; and burgesses from boroughs; the words of the old *Latin* writ to the sheriff for the election, being *Duos*

milites gladiis cinctos magis idoneos & discretos comitatûs tui; & de quâlibet civitate comitatûs tui duos cives; & de quolibet burgo duos burgenses, de discretioribus & magis sufficientibus, &c. 1 Inst. 109.

II. THE Parliament is regularly to be summoned by the King's writ or letter issued out of Chancery, by advice of the Privy Council, at least forty days before it begins to sit. This is a provision of the *Magna Carta* of King John: *Faciemus summoneri, &c. ad certum diem, scilicet ad terminum quadraginta dierum, ad minus; et ad certum locum. Black. Mag. Ch. Joh. c. 14.* It is enforced by *stat. 7 & 8 W. 3. c. 25.* which enacts that there shall be forty days between the teste and the return of the writ of summons. This time is now, by practice, generally extended to 50 days or more, in consequence of the union with *Scotland* and *Ireland*. The term of 50 days is mentioned in the act of union with *Scotland* (*5 Ann. c. 8. Art. 22.*) as the period to be allowed by proclamation for assembling the first Parliament of *Great Britain*. See *2 Hats. 235.*

It is a branch of the royal prerogative, that no Parliament can be convened by its own authority; [meaning by the authority of the Lords and Commons only, who in common parlance, though not in strictness of law, are considered as the Parliament;] or by the authority of any, except the King alone. And this prerogative is founded upon a very good reason; for supposing the Lords and Commons had a right to meet spontaneously without being called together, it is impossible to conceive that all the members, and each of the Houses, would agree unanimously upon the proper time and place of meeting; and if half of the members met, and half absented themselves, who shall determine which is really the legislative body, the part assembled, or that which stays away? It is therefore necessary that the Parliament should be called together at a determinate time and place; and highly becoming its dignity and independence, that it should be called together by none but one of its own constituent parts: and of the three constituent parts, this office can only appertain to the King, as he is a single person, whose will may be uniform and steady; the first person in the nation, being superior to both Houses in dignity; and the only branch of the Legislature that has a separate existence, and is capable of performing any act at a time when no Parliament is in being. Nor is it an exception to this rule, that by some modern statutes, on the demise of a King or Queen, if there be then no Parliament in being, the last Parliament revives, and it is to sit again for six months, unless dissolved by the successor; for this revived Parliament must have been originally summoned by the crown.

It is true, that by *stat. 16 Car. 1. c. 1.* it was enacted, that, if the King neglected to call a Parliament, for three years, the Peers might assemble and issue out writs for choosing one; and, in case of neglect of the Peers, the constituents might meet and elect one themselves. But this, if ever put in practice, would have been liable to all the inconveniences just stated; and this act itself was deemed so highly detrimental and injurious to the royal prerogative, that it was repealed by *stat. 16 Car. 2. c. 1.* From thence therefore no precedent can be drawn; and in fact it is an exception which fully proves the rule.

It is also true, that the Convention Parliament, which restored King *Charles* the Second, met above a month before his return; the

Lords by their own authority, and the Commons in pursuance of writs issued in the name of the keepers of the liberty of *England* by authority of Parliament; and that the said Parliament sat till the twenty-ninth of *December*, full seven months after the Restoration, and enacted many laws, several of which are still in force. But this was for the necessity of the thing, which supersedes all law; for if they had not so met, it was morally impossible that the kingdom should have been settled in peace. And the first thing done after the King's return was to pass an act, declaring this to be a good Parliament, notwithstanding the want of the King's writs. See *stat. 12 Car. 2. c. 1.* So that as the royal prerogative was chiefly wounded by their so meeting, and as the King himself, who alone had a right to object, consented to waive the objection, this cannot be drawn into an example in prejudice of the rights of the Crown. Besides, we should also remember, that it was at that time a great doubt among the lawyers, whether even this healing act made it a good Parliament; and held by very many in the negative; though it seems to have been too nice a scruple. 1 *Sid. 1.* And, perhaps out of abundant caution, it was thought necessary to confirm its acts in the next Parliament, by *stat. 13 Car. 2. cc. 7, 14.*

It is likewise true, that at the time of the Revolution, A. D. 1688, the Lords and Commons by their own authority, and upon the summons of the Prince of *Orange* (afterwards King *William*), met in a Convention, and therein disposed of the Crown and Kingdom. But it must be remembered, that this assembling was upon a like principle of necessity as at the Restoration; that is, upon a full conviction that King *James II.* had abdicated the government, and that the throne was thereby vacant; which supposition of the individual members was confirmed by their concurrent resolutions when they actually came together. And in such a case as the palpable vacancy of the throne, it follows *ex necessitate rei*, that the form of the royal writs must be laid aside, otherwise no parliament can ever meet again. For let us put another possible case, for the sake of argument, that the whole royal line should at any time fail and become extinct, which would indisputably vacate the throne; in this situation it seems reasonable to presume, that the body of the nation, consisting of Lords and Commons, would have a right to meet and settle the government; otherwise there must be no government at all. And upon this, and no other principle, did the Convention in 1688 assemble. The vacancy of the throne was precedent to their meeting, without any royal summons, not a consequence of it. They did not assemble without writ, and then make the throne vacant by the King's abdication; but the throne being previously vacant by the King's abdication, they assembled without writ, as they must do if they assembled at all. Had the throne been full, their meeting would not have been regular; but, as it was really empty, such meeting became absolutely necessary. And accordingly it is declared by *stat. 1 W. & M. st. 1. c. 1.* that this convention was really the two Houses of Parliament; notwithstanding the want of writs or other defects of form. So that notwithstanding these two capital exceptions, which were justifiable only on a principle of necessity, (and each of which by the way induced a revolution in the government,) the rule laid down is, in general, certain, that the King only can convoke a Parliament. And this by the antient statutes

of the realm, 4 *E. 3. c. 14*: 36 *E. 3. c. 10*. he is bound to do *every year, or oftener, if need be*. Not that he is, or ever was, obliged by these statutes to call a *new* Parliament every year, but only to permit a Parliament to sit annually for the redress of grievances, and dispatch of business, *if need be*. These last words are so loose and vague, that such of our monarchs as were inclined to govern without Parliaments, neglected the convoking them sometimes for a very considerable period, under pretence that there was no need for them.

Mr. *Granville Sharp*, in a treatise published some years ago, argued ingeniously against this construction of the *stat. 4 E. 3*; and maintained that the words *if need be*, referred only to the preceding word *oftener*; so that the true signification was, that a Parliament should be held once every year at all events; and, if there should be any need to hold it oftener, then, more than once. The contemporary records of Parliament, in some of which it is so expressed without any ambiguity, prove beyond all controversy that this is the true construction. See *Christian's* note on 1 *Comm. c. 2. p. 153*.

To remedy the evil of discontinuing Parliaments it was enacted, that the sitting and holding of them shall not be intermitted above three years at the most. And by *stat. 1 W. & M. st. 2. c. 2*, it is declared to be one of the rights of the people, that for redress of all grievances, and for the amending, strengthening, and preserving the laws, Parliaments ought to be held *frequently*. This indefinite frequency is again reduced to a certainty by *stat. 6 W. & M. c. 2*; which enacts, as the statute of *Charles the Second* had done before, that a new Parliament shall be called within three years after the determination of the former.

Though the *stat. 6 W. & M. c. 2*, confirms the statute 16 *Car. 2. c. 1*, in declaring that there shall not be a longer interval than three years after a dissolution; yet the *stat. 16 Car. 2.* seems to be more extensive in its operation; by providing that there shall not be an intermission of more than three years after any sitting of Parliament, which will extend also to a prorogation. But as the mutiny-act, and the land-tax and malt-tax acts are passed for one year only, the statutes enforcing the meeting of Parliament are now of little avail; for the Parliament must necessarily be summoned for the despatch of business, once every year. In antient times, indeed, especially before the abolition of the feudal tenures at the restoration of *Charles II.* our Kings had such a revenue, independent of Parliament, that they were enabled to reign many years together without the assistance of Parliament, and in defiance of the statutes made to compel their calling it together. 1 *Comm. 153. in n.*

By statute, *stat. 5 R. 2. st. 2. c. 4.* every person and commonalty, having summons to Parliament, shall come thither, on pain to be amerced, or otherwise punished: and if the Sheriff doth not summon the cities and boroughs as usual, he shall likewise be punished.

III. THE constituent parts of a Parliament are, *The King's Majesty*, sitting there in his royal political capacity; and the three Estates of the Realm, *the Lords Spiritual, the Lords Temporal*, (who sit together with the King in one house,) and the *Commons*, who sit by themselves in another. Others however, more consonantly with the common understanding of the nature and powers of Parliament, consider the three

Estates of the Realm to be *King, Lords, and Commons*. See *post*. And the King, and these three Estates together, form the great corporation or body politic of the kingdom, of which the King is said to be *caput, principium, et finis*. 4 *Inst.* 1, 2: *stat.* 1 *Eliz.* c. 3: *Hale of Parl.* 1. For, upon their coming together, the King meets them either in person or by representation, without which there can be no beginning of a Parliament; and he also has alone the power of dissolving them. 4 *Inst.* 6: 1 *Comm.* c. 2. *p.* 153.

The learned commentator then proceeds to shew how highly necessary it is, for preserving the balance of the Constitution, that the Executive Power should be a branch, though not the whole, of the Legislative; and how each branch of our civil polity supports and is supported, regulates and is regulated, by the rest. See 1 *Comm.* *p.* 153—155; and as to the general extent of the King's power, prerogative, &c. this Dictionary, title *King*.

On holding a Parliament, the King, the first day, sits in the Upper House, and by himself, or the Lord Chancellor, shews the reason of their meeting; then the Commons are commanded to choose their Speaker; which done, two or three days afterwards he is presented to the King, and after some speeches is allowed, and sent down to the House of Commons; when the business of Parliament proceeds. 11 *Rept.* 115. See *post* VI.

A Parliament cannot begin, on return of the writs, without the King in person, or by representation; and by representation two ways, either by a Guardian of *England*, by letters patent under the great seal, when the King is out of the realm; or by commission, to certain Lords in case of indisposition, &c. when his Majesty is at home. 4 *Inst.* 6, 7. And if any Parliament is to be holden before a Guardian of the Realm, there must be a special commission to begin the Parliament; but the teste of the writs of summons is to be in the guardian's name: and by an antient law, *stat.* 8 *H.* 5. c. 1, if the King, being beyond sea, cause a Parliament to be summoned in this kingdom, by writ under the teste of his lieutenant, and after the King returns hither, the Parliament shall proceed without any new summons.

In the 5th year of *Henry V.* a Parliament was holden before *John Duke of Bedford*, brother to the King, and guardian of the kingdom. *Anno* 3 *Ed.* IV. a Parliament was begun in the presence of the King, and prorogued to a further day; and then *William Archbishop of York*, the King's commissary by letters patent, held the same Parliament, and made an adjournment, &c. And 28 *Eliz.* the Queen by commission under the great seal, (reciting, that for urgent occasions she could not be present in her royal person.) did authorise *John Whitgift*, Archbishop of *Canterbury*, *William Lord Burleigh*, Lord Treasurer of *England*, and *Henry Earl of Derby*, Lord Steward, to hold a Parliament, &c. *Ad faciendum omnia et singula, &c. necnon ad Parliamentum adjornand. et prorogand.* &c. And in the upper part of the page, above the beginning of the commission is written, *Dominæ Regina repræsentatur per commissionarios, viz.* &c. These commissioners sat on a form before the cloth of state, and after the commission read, the Parliament proceeded.

A Parliament may be holden at any place the King shall assign. See 1 *Comm.* *p.* 153. *in n.*

The constituent parts of Parliament, next in order, are the

Spiritual Lords. These consist of two Archbishops, and twenty-four Bishops; and at the dissolution of monasteries by *Henry VIII.* consisted likewise of twenty-six mitred abbots, and two priors. *Seld. Title Hon.* 2, 5, 27. A very considerable body; and in those times equal to half the number of the temporal nobility: *Co. Litt.* 97: See 4 *Inst.* 1; by which it appears, that the number of the temporal nobility was one hundred and six. All these hold, or are supposed to hold, certain antient baronies, under the King; for *William the Conqueror* thought proper to change the spiritual tenure, of frankalmoign or free alms, under which the bishops held their lands during the *Saxon* Government, into the feudal or *Norman* tenure by barony; which subjected their estates to all civil charges and assessments, from which they were before exempt; *Gilb. Hist. Exch.* 55: *Spelm. W.* 1. 291; and in right of succession to those baronies, which were unalienable from their respective dignities, the bishops and abbots were allowed their seats in the House of Lords. *Glanv.* 7. 1: *Co. Litt.* 97: *Seld. Title Hon.* 2, 5, 19. But though these Lords Spiritual are, in the eye of the law, a distinct estate from the Lords Temporal, and are so distinguished in most of our acts of Parliament, yet in practice they are usually blended together under the one name of *the Lords*; they intermix in their votes, and the majority of such intermixture binds both Estates. And from this want of a separate assembly, and separate negative, of the prelates, some writers have argued (*Whitelocke on Parl.* c. 72: *Warburt. Alliance*, b. 2. c. 3.) very cogently, that the Lords Spiritual and Temporal are now in reality only one Estate; *Dyer* 60: which is unquestionably true in every effectual sense; though the antient distinction between them still nominally continues. For if a bill should pass their House there is no doubt of its validity, though every Lord Spiritual should vote against it; of which *Selden* and Sir *E. Coke* give many instances; as on the other hand, it seems that it would be equally good, if the Lords Temporal present were inferior to the bishops in number, and every one of those Temporal Lords gave his vote to reject the bill; though Sir *E. Coke* seems to doubt whether this would not be an ordinance, rather than an act of Parliament. 4 *Inst.* 25: see *Selden's Baronage*, p. 1. c. 6: *Gibbs. Cod.* 286. See also 2 *Inst.* 585, 6, 7: and *Keilw.* 184; where it is holden by the Judges, 7 *Hen. VIII.* that the King may hold a Parliament without any Spiritual Lords. This was also exemplified in fact in the two first Parliaments of *Charles II.* wherein no bishops were summoned; till after the repeal of the *stat.* 16 *Car.* 1. c. 27. by *stat.* 13 *Car.* 2. st. 1. c. 2. On the Union with *Ireland* four Lords Spiritual were added; to sit by rotation of Sessions. See title *Ireland*.

No rational or antient principle can perhaps be suggested, why the bishops should not have exactly the same legislative functions, as the other Peers of Parliament; the style of the House of Lords, viz. the Lords Spiritual and Temporal, was probably intended as a compliment to the bishops; to express the precedence that they are entitled to, before all the temporal barons; which originally was the only character that gave a claim to a seat in the House of Lords. Unless precedents could be found to the contrary, there seems to be no reason to doubt, but that any act at this day would be valid, though all the Temporal Lords or all the Spiritual Lords were absent. 1 *Comm.* 156, n.

In the *stat. 1 Eliz. c. 2.* the style of the Parliament is, the Lords and Commons in Parliament assembled; but there is the same style used also in *stat. 1 Eliz. c. 11.*, a revenue act. On the 18th of *February* 1641, a motion was made in the *Irish House of Lords*, "That as all the bishops were against a representation about certain grievances, the Lords Spiritual should not be named: upon which the Judges were consulted; and their opinion was, that in any act or order which passed, it must be entered "by the Lords Spiritual and Temporal." 1 *Mountm.* 344.

The *Lords Temporal* consist of all the Peers of the realm; (the bishops not being in strictness held to be such, but merely Lords of Parliament, *Staundf. P. C.* 153;) by whatever title of nobility distinguished; Dukes, Marquisses, Earls, Viscounts, or Barons; as to which dignities, see this Dictionary, under those titles, and title *Peers*. Some of these sit by descent, as do all antient Peers; some by creation, as do all new-made ones; others, since the union with *Scotland* and *Ireland*, by election; which is the case of the sixteen Peers, who represent the body of the Scots nobility, and the twenty-eight temporal Lords, elected for life by the Peers of *Ireland*. See title *Ireland*. The number of Lords Temporal is indefinite, and may be increased, at will, by the power of the Crown; and once, in the reign of Queen *Anne*, there was an instance of creating no less than twelve together; in contemplation of which, in the reign of *George I.* a bill passed the House of Lords, and was countenanced by the then ministry, for limiting the number of the peerage. This was thought by some to promise a great acquisition to the Constitution; by restraining the prerogative from gaining the ascendant in that august assembly, by pouring in at pleasure an unlimited number of new-created Lords. But the bill was ill relished, and miscarried in the House of Commons, whose leading members were then desirous to keep the avenues to the other House as open and easy as possible. See 1 *Comm.* 157. By the union with *Ireland*, the number of *Irish* Peers is limited, so that by future creation it cannot exceed one hundred. See title *Ireland*.

The *Commons*, according to the present ordinary acceptation of the term, consist of all such men of property in the kingdom as have not seats in the House of Lords; indeed in its largest sense the word comprehends all who are not Peers of the realm: but it appears, in its original signification, to have been confined to those only who had a right to sit, or had a right to vote for representatives in, the House of Commons; and in its strict parliamentary sense, in which alone it ought to be here understood, it means the *Knights*, *Citizens*, and *Burgesses* who are the representatives, in the House of Commons, of the various counties, cities, and boroughs in the kingdom. In a free state, every man who is supposed a free agent ought to be in some measure his own governor; and therefore a branch, at least, of the legislative power should reside in the whole body of the People. In the State of *Great Britain* it is wisely contrived, that the people should do that, by their representatives, which it is impracticable to perform in person; representatives chosen by a number of minute and separate districts, wherein all the voters are, or easily may be, distinguished. The counties are therefore represented by knights, elected by the proprietors of lands: the cities and boroughs are represented by citizens and burgesses, chosen by the mercantile part, or supposed trading interest, of the nation. The number of *English*

representatives is five hundred and thirteen, and of *Scotch* forty-five; in all, five hundred and fifty-eight. And every member, though chosen by one particular district, when elected and returned, serves for the whole realm. For the end of his coming thither is not particular, but general; not barely to advantage his constituents, but the common-wealth; to advise his Majesty (as appears from the writ of summons) “*de communi consilio, super negotiis quibusdam arduis et urgentibus, regem, statum, et defensionem regni Angliæ, et ecclesiæ Anglicanæ, concernentibus.*” 4 *Inst.* 14. And therefore (says *Blackstone*) he is not bound to consult with, or take the advice of, his constituents upon any particular point, unless he himself thinks it proper or prudent so to do. See 1 *Comm.* 157, 9. and the notes there.

These are the constituent parts of a Parliament; the King, the Lords Spiritual and Temporal, and the Commons; Parts, of which each is so necessary, that the consent of all three is required to make any new law that shall bind the Subject. Whatever is enacted for law by one, or by two only of the three, is no statute; and to it no regard is due, unless in matters relating to their own privileges. For though, in times of madness and anarchy, the House of Commons once passed a vote (which, as has been well observed, was a natural prologue to the tragical drama immediately afterwards performed), “that whatsoever is enacted or declared for law, by the Commons in Parliament assembled, hath the force of law; and all the people of this nation are concluded thereby, although the consent and concurrence of the King or House of Peers be not had thereto;” yet, when the Constitution was restored in all its forms, it was particularly enacted by *stat.* 13 *Car.* 2. c. 1, that if any person shall maliciously or advisedly affirm, that both or either of the Houses of Parliament have any legislative authority, without the King, such person shall incur all the penalties of a *fræmunire*: we must, however, remember the exceptions to this rule; arising, as has been already mentioned, from State necessity.

IV. 1. THE power and jurisdiction of Parliament, says Sir *Edward Coke*, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. 4 *Inst.* 36. It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws; concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal; this being the place where that absolute despotic power, which must in all governments reside somewhere, is intrusted, by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of law, are within the reach of this extraordinary tribunal. It can regulate or new-model the succession to the Crown; as was done in the reign of *Henry VIII.* and *William III.* It can alter the established religion of the land; as was done, in a variety of instances, in the reigns of King *Henry VIII.* and his three children. It can change and create afresh even the Constitution of the kingdom, and of Parliaments themselves; as was done by the act of union, and the several statutes for triennial and septennial elections. It can, in short, do every thing that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of Parliament; an

expression, however, which in fact seems to signify nothing more than the supreme sovereign power of the State; or a power of action uncontrolled by any superior. In this sense, the King in the exercise of his prerogatives, and the House of Lords in the interpretation of laws, are also omnipotent; that is, free from the control of any superior provided by the Constitution. True it is, that what the Parliament doth, no authority upon earth can undo. So that it is a matter most essential to the liberties of this kingdom, that such members be delegated to this important trust as are most eminent for their probity, their fortitude, and their knowledge; for it was a known apophthegm of the great lord treasurer *Burleigh*, "that *England* could never be ruined but by a Parliament; and as *Sir Matthew Hale* observes, this being the highest and greatest Court, over which none other can have jurisdiction in the kingdom, if by any means a misgovernment should any way fall upon it, the Subjects of this kingdom are left without all manner of remedy of Parliament. *Hale of Parl.* 49. To the same purpose *Montesquieu* (though it is earnestly to be hoped too hastily,) presages, that as *Rome*, *Sparta*, and *Carthage* have lost their liberty and perished, so the Constitution of *England* will in time lose its liberty, will perish; it will perish whenever the Legislative Power shall become more corrupt than the executive. *Sp. L. l. 11. c. 6.*

It must be owned that *Mr. Locke*, and other theoretical writers have held, that "there remains still inherent in the people a supreme power to remove or alter the Legislature, when they find that Legislature act contrary to the trust reposed in them; for when such trust is abused, it is thereby forfeited, and devolves to those who gave it." *Locke on Gov. part 2. § 149, 227.* But, however just this conclusion may be in theory, we cannot practically adopt it: nor take any legal steps to carry it into execution, under any dispensation of government at present actually existing. For this devolution of power to the people at large, includes in it a dissolution of the whole form of government established by that people; reduces all the members to their original state of equality, and by annihilating the sovereign power, repeals all positive laws whatsoever, before enacted. No human laws will therefore suppose a case, which at once must destroy all law, and compel men to build afresh upon a new foundation; nor will they make provision for such a desperate event, as must render all legal provision ineffectual. So long, therefore, as the *English* Constitution lasts, we may venture to affirm, that the power of Parliament is absolute and without control.

In order to prevent the mischiefs that might arise by placing this extensive authority in hands, either incapable or improper to manage it, it is provided by custom and the law of Parliament, that no one shall sit or vote in either House unless he be twenty-one years of age. *Whitel. c. 50: 4 Inst. 47.* This is also expressly declared by *stat. 7 & 8 W. 3. c. 25. § 8.* with regard to the House of Commons; doubts having arisen from some contrary adjudications whether or not a minor was incapacitated from sitting in that House.—This provision has not always been strictly attended to. It is also enacted by *stat 7 Jac. 1. c. 6.* that no member be permitted to enter into the House of Commons, till he hath taken the Oath of Allegiance before the Lord Steward, or his deputy. The Lord Steward, on the first day of the meeting of a new Parliament, attends in a room ad

joining to the House of Commons, and administers the oath to the members present; and he then executes a commission or deputation, empowering any one or more of a great number of members specified to administer the oath to others. By *stats. 30 Car. 2. st. 2: 1 Geo. 1. c. 13.* no member shall vote or sit in either House till he hath, in the presence of the House, taken the Oath of Allegiance, Supremacy, and Abjuration; (the latter now as altered by *stat. 6 Geo. 3. c. 53.* see title *Oaths*;) and subscribed and repeated the declaration against transubstantiation, and invocation of Saints, and the sacrifice of the Mass. *Aliens*, unless naturalized, were likewise by the law of Parliament incapable to serve therein; and now it is enacted, by *stat. 12 & 13 W. 3. c. 2.* that no alien, even though he be naturalized, shall be capable of being a member of either House of Parliament.

There are not only these standing incapacities, but if any person is made a Peer by the King, or elected to serve in the House of Commons, by the people, yet may the respective Houses, upon complaint of any crime in such person, and proof thereof, adjudge him disabled, and incapable to sit as a member, and this by the law and custom of Parliament. 1 *Comm. c. 2. ff. 163;* cites *Whitel. of Parl. c. 102;* and refers to *Lords' Journ. 3 May 1620: 13 May 1624: 26 May 1725: Comm. Journ. 14 Feb. 1580: 21 Ju. 1628: 9 Nov. 21 Jan. 1640: 6 Mar. 1676: 6 Mar. 1711: 17 Feb. 1769.*

The sentence immediately preceding was not in the first editions of the Commentaries, but was added, no doubt with an allusion to the *Middlesex* election; the circumstances of which were briefly these: On *January 19-20, 1764, J. W.* was expelled the House of Commons for being the author of a seditious libel: at the next election in 1768 he was elected for the county of *Middlesex*; and on *February 3, 1769,* it was resolved, that *J. W. Esq.* who had acknowledged himself to be the author and publisher of a paper which the House had previously pronounced to be an insolent, scandalous, and seditious libel, (not the same for which he was expelled in the former Parliament,) and who had been convicted in the Court of K. B. of having printed and published a seditious libel, and *three obscene and impious libels*, and being sentenced to twenty-two months' imprisonment, *be expelled this House.* A new writ having been ordered for the county of *Middlesex*, Mr. *W.* was re-elected without opposition; and on *February 17, 1769,* it was resolved, "that *J. W. Esq.* having been, in this session of Parliament, expelled this House, was and is incapable of being elected a member to serve in this present Parliament:" and the election was declared void, and a new writ ordered. He was a second time re-elected without opposition; and on *March 17, 1769,* the House again declared the election void, and ordered a new writ: At the next election Mr. *Luttrell*, who had vacated his seat for the purpose, by accepting the Chiltern Hundreds, offered himself a candidate against Mr. *W.* Mr. *W.* had 1143 votes, and Mr. *Luttrell* 296. Mr. *W.* was again returned by the Sheriff. On *April 15, 1769,* the House resolved, that Mr. *Luttrell* ought to have been returned, and ordered the return to be amended: allowing fourteen days for a petition against the return: one was accordingly presented on *April 29,* by certain freeholders of *Middlesex*; and on the 8th of *May* the House resolved that Mr. *Luttrell* was duly elected. On the 3d of *May 1783,* (fourteen years afterwards!) it was resolved, that the resolution of the

17th *February* 1769 should be expunged from the Journals of the House, as *being subversive of the rights of the whole body of electors of this kingdom*. And at the same time it was ordered, that all the declarations, orders, and resolutions respecting the election of *J. W.* should be expunged.

The history of *England* furnishes many instances of important constitutional questions that have deeply agitated the minds of the people of this country, which can raise little or no doubt in the minds of those who view them at a distance, uninfluenced by interest or passion. It has been thought by some that it was a *violent* measure in the House of Commons to expel a member for the libels which he had published; but that the subsequent proceedings were agreeable to the law of Parliament, that is, to the law of the land, the authorities referred to, by the learned commentator, seem most unanswerably to prove. But what shall be considered to be the law with regard to the incapacities of candidates, since these proceedings were expunged, it will be difficult indeed to determine. The resolution to expunge implies the correction of an error, after mature deliberation. If it had not been declared that a former resolution was subversive of the rights of electors, it might perhaps have been supposed that it was intended only as a personal compliment to the member expelled. But it does not state in what instance the former resolution was so subversive. They who wish for a certain knowledge of their rights and liberties must lament such a want of precision; but they must wait with patience till the wisdom of the House has occasion to explain its own judgment; and which, perhaps, if ever it should arise, would be attended with the same outrageous spirit of party, which too frequently influences the decision of public questions; acting rather upon grounds and motives, which ought to be discarded with the most religious impartiality, than on the broad basis of sound constitutional doctrine, or the real interest and welfare of the Subject. See 1 *Comm. c. 2. p.* 163, and *n.* More modern instances of expulsion have occurred, but being acquiesced in without contest, are not sufficient to settle the principle of such proceedings.

As every Court of justice hath laws and customs for its direction, some the civil and canon, some the Common Law, others their own peculiar laws and customs; so the high Court of Parliament hath also its own peculiar law, called the *Lex et consuetudo Parliamenti*: a law much better to be learned out of the rolls of Parliament, and other records, and by precedents and continual experience, than can be expressed by any one man. 4 *Inst.* 50. It will be sufficient to observe, that the whole of the law and custom of Parliament has its original from this one maxim, "that whatever matter arises, concerning either House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere." 4 *Inst.* 15. Hence, for instance, the Lords will not suffer the Commons to interfere in settling the election of a Peer of *Scotland*; the Commons will not allow the Lords to judge of the election of a member; nor will either House permit the subordinate Courts of law to examine the merits of either case. But the maxims upon which they proceed, together with the method of proceeding, rest entirely in the breast of the Parliament itself; and are not defined and ascertained by any particular stated laws. See *post* VI. (B) 3.

The Court at *Westminster* may judge of the privilege of Parlia-

ment, where it is incident to a suit the Court is possessed of: and Courts may proceed to execution between the sessions of Parliament, notwithstanding appeals lodged, &c. 2 *St. Tr.* 66, 209.

The King cannot take notice of any thing, said to be done in the House of Commons, but by the report of the House, and every member of the House of Parliament has a judicial place, and cannot be a witness. 4 *Inst.* 15. When *Charles I.* being in the House of Commons, and sitting in the Speaker's chair, asked the then speaker, whether certain members (whom the King named) were present? The Speaker, from a presence of mind which arose from the genius of that House, readily answered, "That he had neither eyes to see, nor tongue to speak, but as the House was pleased to direct him." *Atkin's Jurisd. and Antiquity of the House of Commons.* Hen. VIII., having commanded Sir *Thomas Gaudy* (one of the judges of the King's Bench) to attend the chief justices and know their opinion, whether a man might be attainted of high treason by Parliament, and never called to answer; the judges declared it was a dangerous question, and that the High Court of Parliament ought to give examples to inferior Courts, for proceeding according to justice, and no inferior Court could do the like. *Lex Constitution* 161.

The House of Lords is a distinct Court from the Commons, to several purposes: they try criminal causes on the impeachments of the Commons; and have an original jurisdiction for the trial of Peers, upon indictments found by a grand jury: they also try causes upon appeals from the Court of Chancery, or upon writs of error to reverse judgments in *B. R.* &c. See *post* V. 2. And all their decrees are as judgments; and judgments given in Parliament may be executed by the Lord Chancellor. 4 *Inst.* 21: *Finch*, 233: 1 *Lev.* 165. Also the House of Commons is a distinct Court to many purposes; they examine the right of elections, expel their own members, and commit them to prison, and sometimes other persons, &c. See *post*. And the book of the clerk of the House of Commons is a record. 2 *Inst.* 536: 4 *Inst.* 23. The Commons, coming from all parts, are the grand inquest of the realm; to present public grievances and delinquents to the King and Lords to be punished by them: and any member of the House of Commons has the privilege of impeaching the highest Lord in the kingdom. *Wood's Inst.* 455.

The High Court of Parliament is the supreme Court in the kingdom, not only for the making, but also for the execution of laws; by the trial of great and enormous offenders, whether Lords or Commoners, in the method of parliamentary impeachment. Acts of Parliament to attain particular persons of treason or felony, or to inflict pains and penalties, are new laws made *pro re natâ*, and by no means an execution of such as are already in being: but an impeachment before the Lords, by the Commons of *Great Britain*, in Parliament, is a prosecution of the already known and established law, and has been frequently put in practice; being a presentment to the most high and supreme Court of criminal jurisdiction by the most solemn grand inquest of the whole kingdom. 1 *Hal. P. C.* 150. A Commoner, it is said by *Blackstone*, who quotes authorities to prove his position, cannot be impeached before the Lords for any capital offence, but only for high misdemeanors; a Peer may be impeached for any crime: But it appears, that the right of impeaching a Commoner even in capital cases, has been claimed and asserted by the Lords. See 4 *Comm.* 260, *in n.*

The Commons usually, in case of an impeachment of a Peer for treason, address the Crown to appoint a Lord High Steward for the greater dignity and regularity of their proceedings; which High Steward was formerly elected by the Peers themselves, though he was generally commissioned by the King. 1 *Hal. P. C.* 350. But it hath been strenuously maintained, that the appointment of an High Steward in such cases is not indispensably necessary, but that the House may proceed without one.

This custom of impeachment has a peculiar propriety in the *English* Constitution; for though in general the union of the legislative and judicial powers ought to be most carefully avoided, yet it may happen that a Subject, intrusted with the administration of public affairs, may infringe the rights of the people, and be guilty of such crimes as the ordinary magistrate either dares not or cannot punish. Of these the representatives of the people, or House of Commons, cannot properly *judge*; because their constituents are the parties injured; and can therefore only *impeach*. In the trial of such an impeachment, ordinary tribunals would naturally be swayed by the authority of so powerful an accuser. Reason, therefore, will suggest that this branch of the Legislature, which represents the people, must bring its charge before the other branch, which consists of the nobility, who have neither the same interests nor the same passions as popular assemblies. It is proper that the nobility should judge, to insure justice to the accused; as it is proper that the people should accuse, to insure justice to the commonwealth. 4 *Comm. c.* 19. *ft.* 261. See *Impeachment*.

As to the Court of the Lord High Steward for the trial of a Peer, see this Dictionary, title *Peers*; and as to the jurisdiction of the House of Lords, see further *post*. V. 2.

After the reign of *Hen. IV.* although the old form of the King's appointing Receivers and Tryers, or Auditors, of petitions, at the beginning of every Parliament, (which is traceable as far back as 33 *Ed. I.* and is still scrupulously adhered to,) was continued, and so ever gave the opportunity of calling the judicature of the whole Parliament into action, yet in point of fact the exercise of jurisdiction in Parliament over causes seems to have gradually fallen into disuse. It has been suggested, however, that though this appointment of Receivers and Tryers, or Auditors, of petitions, at the beginning of a new Parliament, has long in point of practice been considered as mere form, yet it seems still to be open to any person at the beginning of a new Parliament, by presenting a petition to the Receivers, within the time limited by the appointment of them, to call into action the duties both of Receivers and of Tryers or Auditors, and so to resuscitate the antient manner of exercising parliamentary jurisdiction, or at least to put to a test its susceptibility of being so revived. It is to be considered also that there may be cases which, from the failure of other modes of relief, may at some future time induce the trial of such an experiment. See *Hargrave's Preface to Hale's Jurisdiction of the Lords' House of Parliament*, *ft.* vi; xxxv. See also *post* V. 2.

IV. 2. THE privileges of Parliament are very large and indefinite; and therefore when in 31 *Hen. 6.* the House of Lords propounded a question to the judges concerning them, the chief justice, Sir *John Fortesque*, in the name of his brethren, declared, "that they ought not

to make answer to that question, for it hath not been used aforetime that the justices should in any wise determine the privileges of the High Court of Parliament; for it is so high and mighty in its nature, that it may make law; and that which is law, it may make no law: and the determination and knowledge of that privilege belongs to the Lords of Parliament, and not to the justices." *Seld. Baronage*, p. 1. c. 4. Privilege of Parliament was principally established, in order to protect its members, not only from being molested by their fellow-subjects, but also more especially from being oppressed by the power of the Crown. If therefore all the privileges of Parliament were once to be set down and ascertained, and no privilege to be allowed but what was so defined and determined, it were easy for the Executive Power to devise some new case, not within the line of privilege, and under pretence thereof to harass any refractory member, and violate the freedom of Parliament. The dignity and independence of the two Houses are therefore in a great measure preserved by keeping the privileges indefinite. But in answer to this observation it has been justly remarked, that clearness and certainty are essentially necessary to the liberty of *Englishmen*; and that rights and privileges cannot well be claimed, unless they are ascertained and defined.

There are several privileges of the members of either House, which are sufficiently certain and notorious. These are privilege of speech, of person: [and before the *stat. 10 Geo. 3. c. 50.* of their domestics, and of their lands and goods]. As to the first, privilege of speech, it is declared by the *stat. 1 W. & M. st. 2. c. 2.* as one of the liberties of the people, "that the freedom of speech, and debates, and proceedings in Parliament, ought not to be impeached, or questioned, in any Court or place out of Parliament." And this freedom of speech (with other privileges) is particularly demanded of the King in person, by the Speaker of the House of Commons, at the opening of every new Parliament.

If any member of either House, however, speak words of offence in a debate, after the debate is over he is called to the bar, where commonly on his knees he receives a reprimand from the Speaker; and if the offence be great, he is sent to the *Tower*. When the bill of attainder of the earl of *Strafford* was passing the House of Commons, Mr. *Taylor*, a member of that House, opposed it with great violence, and being heard, to explain himself, was commanded to withdraw; whereupon it was resolved he should be expelled the House, be made incapable of ever serving as a member of Parliament, and should be committed prisoner to the *Tower*, there to remain during the pleasure of the House: and he was called to the bar, where he kneeled down, and Mr. Speaker pronounced the sentence accordingly. And Sir *Sahn Elliot*, *Denzil Hollis*, and another person having spoken these words, *viz.* "the King's Privy Council, his judges and his counsel learned in the law, have conspired to trample under their feet the liberties of the Subject, and of this House," an information was filed against them by the Attorney General; and farther, for that the King having signified his pleasure to the House of Commons for the adjournment of the Parliament, and the Speaker endeavouring to get out of the chair, they *violenter*, &c. detained him in the chair, upon which there was a great tumult in the House, to the terror of the Commons there assembled, and against their allegiance, in contempt of the King, his crown and dignity: the defendants pleaded to the ju-

risdiction of the Court; and refused to answer but in Parliament; but it was adjudged, that they ought to answer, the charge being for a conspiracy, and seditious acts, to prevent the adjournment of the Parliament, which may be examined out of it; and not answering, judgment was given against them, that Sir *John Elliot* should be committed to the *Tower*, and fined 2000*l.*; and the other two were fined and imprisoned. *Cro. Car.* 130.

The other privileges, of persons, [and heretofore of servants, lands, and goods,] are immunities as antient as *Edward the Confessor*; in whose laws we find this precept, "*ad synodos venientibus sive summoniti sint, sive per se quid agendum habuerint sit summa pax.*" *L. Ed. Conf. c.* 3. This included formerly not only privilege from illegal violence, but also from legal arrests and seizures by process from the Courts of law. And still to assault by violence a member of either House, or his menial servants, is a high contempt of Parliament, and there punished with the utmost severity. It has likewise peculiar penalties annexed to it in the Courts of law, by *stat.* 5 *Hen.* 4. *c.* 6. and 11 *Hen.* 6. *c.* 11. By this latter statute, assaulting a member coming to or attending in Parliament incurs the penalty of double damages, and the offender shall make fine and ransom.

Sir *Robert Brandling* made an assault upon Mr. *Witherington*, a member of the House of Commons, in the country before his coming up to Parliament, and Sir *Robert* was sent for by the House, and committed to the *Tower*. And *anno* 19 *Jac.* I. some speeches passed privately in the House between two of the members, and one of them going down the Parliament stairs struck the other, who catching at a sword in his man's hand, endeavoured to return the stroke; on complaint to the House of Commons they were both ordered to attend, where he who gave the blow was committed to the *Tower* during the pleasure of the House. *Dict.*

Neither can any member of either House be arrested and taken into custody, unless for some indictable offence; without a breach of the privilege of Parliament. See *post*.

But all other privileges which derogate from the Common Law in matters of civil right are now at an end, save only as to the freedom of the member's person; which in a Peer (by the privilege of peerage) is for ever sacred and inviolable; and in a Commoner (by the privilege of Parliament) for forty days after every prorogation, and forty days before the next appointed meeting: which is now, in effect, as long as the Parliament subsists, it seldom being prorogued for more than fourscore days at a time. 2 *Lev.* 72. It does not appear that the privilege from arrest is limited to any precise time after a dissolution; but it has been determined by all the judges, that it extends to a convenient time. *Col. Pit's Case*, 2 *Str.* 988. *Prynne* is of opinion, that it continued for the number of days the member received wages after a dissolution: which were in proportion to the distance between his home and the place where the Parliament was held. 4 *Parl. Writs.* 68. As to all other privileges which obstruct the ordinary course of justice, they were restrained by *stats.* 12 *W. 3. c.* 3: 2 & 3 *Ann. c.* 18: 11 *Geo.* 2. *c.* 24; and are now totally abolished by *stat.* 10 *Geo.* 3. *c.* 50; which enacts, that any suit may at any time be brought against any Peer or member of Parliament, their servants, or any other person entitled to privilege of Parliament; which shall not be impeached or delayed by pretence of any such privilege; except that the person

of a member of the House of Commons shall not thereby be subject to any arrest of imprisonment. Likewise, for the benefit of commerce, it is provided by *stat. 4 Geo. 3. c. 33.* that any trader, having privilege of Parliament, may be served with legal process for any just debt to the amount of 100*l.* and unless he makes satisfaction within two months, it shall be deemed an act of bankruptcy; and that a commission of bankrupt may be issued against such privileged traders in like manner as against any other. See this Dictionary, title *Bankrupt.*

The *stat. 12 W. 3. c. 3.* enacted, that actions might be prosecuted against persons entitled to privilege of Parliament, after a dissolution or prorogation, until a new Parliament was called, or the same was re-assembled: and after adjournment for above fourteen days, the respective Courts might proceed to judgment, &c. Proceedings were to be by summons and distress infinite, &c. until the parties should enter a common appearance; and the real or personal estates of the defendants to be sequestered for default of appearance; but the plaintiff not to arrest their bodies; and where any plaintiff should be staid or prevented from proceeding by privilege of Parliament, he should not be barred by any statute of limitation, or nonsuited, dismissed, or his suit discontinued for want of prosecution; but at the rising of the Parliament should be at liberty to proceed to judgment and execution. This act was, by *stat. 10 Geo. 3. c. 50.* extended to *Scotland.* See title *Privilege.*

The *stat. 2 & 3 Ann. c. 18.* provided, that actions may be prosecuted against officers of the revenue, or in any place of public trust, for any forfeiture or breach of trust, &c. and shall not be staid by colour of privilege; but such officer being a member of Parliament, is not subject to arrest during time of privilege, but summons, attachment, &c.

The *stat. 11 Geo. 2. c. 24.* enacted, that any person might prosecute a suit in any Court of record, &c. in *Great Britain* or *Ireland*, against any Peer or member of the House of Commons, or other person entitled to privilege, in the intervals of Parliaments, or of Sessions, if above fourteen days; and the said Courts, after dissolutions or prorogations, were to give judgment, and award execution: and no proceedings in law against the King's immediate debtor, as such, &c. to be delayed under colour of such privilege; only the person of a Member of Parliament, &c. shall not be arrested or imprisoned.

The *stat. 10 Geo. 3. c. 50.* already mentioned, provides, that suits may at any time be prosecuted in Courts of record, equity, or admiralty, and Courts having cognizance of causes matrimonial, and testamentary, against Peers and Members of the House of Commons, and their servants, &c. Process by *distringas* being found dilatory, the Court, out of which the writ proceeds, may order the issues to be sold, and the money arising thereby to be applied to pay the costs to the plaintiff, and the surplus to be retained till the appearance of the defendant, &c.—When the purpose of the writ is answered, the issues are to be returned; or, if sold, the money remaining is to be repaid.—Obedience to the rule of the Court of King's Bench, Common Pleas, or Exchequer may be enforced by distress infinite.

Stat. 47 Geo. 3. st. 2. c. 40. enacts, that when any Bill of complaint, &c. shall be exhibited in any Court of equity against any member of the House of Commons, it shall not be necessary to leave a copy of the Bill with the Defendant, or at his place of abode, as formerly practised; but the person exhibiting such Bill may proceed, for want of

appearance or answer, to sequestrate the real and personal Estate of such member, as before the passing of the act he might have done, after leaving the Copy of the Bill with the Defendant.

Judgment was had against the defendant, and afterwards he was chosen a member of Parliament, and after his election he was taken in execution, yet he had his privilege; though the book tells us *minus justè*. Moor 57. And where judgment being had against a defendant, he was taken in execution in the morning, and about three hours afterwards was chosen a member of Parliament; the House agreed, that being arrested before he was chosen, &c. he shall not have his privilege. Moor 340. See further this Dictionary, title *Privilege*.

To shew what the Subject has gained by the provisions of the several acts of Parliament, which have restrained the privileges of members, so far as they could be used as exceptions to, or infringements on, public justice, we need only recur to the cases in our books treating of the privileges of Parliament, relating to arrests of members of the House of Commons, and their servants, and the manner of their confinement, releasement, &c. In the first year of King Jac. I., Sir Thomas Shirley, a member of Parliament, was arrested four days before the sitting of the Parliament, and carried prisoner to the *Fleet*; on which a warrant issued to the clerk of the Crown for a *habeas corpus* to bring him to the House, and the serjeant was sent for in custody, who being brought to the bar, and confessing his fault, was excused for that time: but on hearing counsel at the bar for Sir Thomas Shirley, and the warden of the *Fleet*, and upon producing precedent, Simpson the prosecutor, who caused the arrest to be made, was ordered to be committed to the *Tower*; and afterwards the warden refusing to execute the writ of *habeas corpus*, and the delivery of Sir Thomas, being denied, was likewise committed to the *Tower*; though on his agreeing to deliver up Sir Thomas, upon a new warrant for a new writ of *habeas corpus*, and making submission to the House, he was discharged: this affair taking up some time, the House entered into several debates touching their privilege, and how the debt of the party might be satisfied; which produced three questions: First, Whether Sir Thomas Shirley should have privilege? Secondly, Whether presently, or to be deferred? And, Thirdly, Whether the House should petition the King for some course for securing the debt of the party, according to former precedents, and saving harmless the warden of the *Fleet*? All which questions were resolved; and a bill was brought in to secure Simpson's debt, &c. which also occasioned the statute 1 Jac. 1. c. 13. for relief of plaintiffs in writs of execution, where the defendants in such writs are arrested, and set at liberty by privilege of Parliament; by which a fresh prosecution and new execution may be had against them when that privilege ceases. *Lex Constitution.* 141. And anno 19 Jac. I. one Johnson, a servant to Sir James Whitlock, a member of the House of Commons, was arrested by two bailiffs; who being told Sir James Whitlock was a Parliament-man, answered, that they had known greater men's servants than his taken from their masters in time of Parliament: and this appearing, the two bailiffs were sentenced to ask pardon of the House and Sir James Whitlock, on their knees; that they should both ride on one horse bare backed, back to back, from *West-*

minster to the *Exchange*, with papers on their breasts signifying their offence; all which was to be executed presently, *sedente curiâ*. *Lex Const.* 141.

In action of debt on a bond, conditioned that *B. B.* should render himself at such a day and place to an arrest; defendant pleaded, that by privilege of Parliament, the members, &c. and their servants ought not to be arrested by the space of forty days before the sitting of the Parliament, nor during the session, nor forty days afterwards; and that *B. B.* was at that time servant to such a member of Parliament, so as he could not render himself to be arrested; upon demurrer to this plea, it was adjudged ill, because he might have rendered himself at the time and place; but then it would be at their peril if he was arrested. 1 *Brownl.* 81.

The only way by which Courts of justice could antiently take cognizance of privilege of Parliament was by writ of privilege, in the nature of a *supersedeas*, to deliver the party out of custody when arrested in a civil suit. *Dyer.* 59; 4 *Pryn. Brev. Parl.* 757. For when a letter was written by the Speaker to the Judges to stay proceedings against a privileged person, they rejected it as contrary to their oath of office. *Latch.* 58. 150: *Noy* 83. But since the *stat.* 12 *W.* 3. c. 3. which enacts, that no privileged person shall be subject to arrest or imprisonment, it hath been held, that such arrest is irregular *ab initio*, and that the party may be discharged upon motion. *Stra.* 989. It is to be observed, that there is no precedent of any such writ of privilege, but only in civil suits: and that the *stat.* 1 *Jac.* 1. c. 13. and that of King *William* (which remedy some inconveniences arising from privilege of Parliament) speak only of civil actions. And therefore the claim of privilege hath been usually guarded with an exception as to the case of indictable crimes; or as it hath been frequently expressed of treason, felony, and breach (or surety) of the peace. See 4 *Inst.* 25. Whereby it seems to have been understood, that no privilege was allowable to the members, their families, or servants, in any *crime* whatsoever; for all crimes are treated by the law as being *contra pacem domini regis*: and instances have not been wanting wherein privileged persons have been convicted of misdemeanors; and committed or prosecuted to outlawry, even in the middle of a session; which proceeding has afterwards received the sanction and approbation of Parliament. *Mic.* 16 *E.* 4, in *Scac. Ld. Raym.* 1461: *Comm. Journ.* 1726. To which may be added, that in the year 1763, the case of writing and publishing seditious libels was resolved, by both Houses, not to be entitled to privilege; and that the reasons upon which that case proceeded extended equally to every indictable offence. It is not a little remarkable, that the contrary position had been determined, a short time before, by the Court of Common Pleas. A Circumstance which serves to shew that the House, where the case of one of their own members and the dignity of the House were concerned, made a determination more consonant to the rules of general municipal justice, and more favourable to political subordination, than one of the Courts of law in *Westminster-Hall*. See 2 *Wils.* 159, 251: *Comm. Journ.* 24 *Nov.*: *Lords Journ. & Protest.* 29 *Nov.* 1763.

The chief, therefore, if not the only, privilege of Parliament in criminal cases, seems to be the right of each House to receive immediate information of the imprisonment or detention of any member, with the reason for which he is detained; a practice that is daily

used upon the slightest military accusations, preparatory to a trial by a Court Martial; and which is recognized by the several temporary statutes for suspending the *Habeas Corpus* act (particularly *stat. 34 Geo. 3. c. 54.*) whereby it is provided, that no member of either House shall be detained, till the matter of which he stands suspected be first communicated to the House of which he is a member, and the consent of the said House obtained for his commitment or detaining. But yet the usage has uniformly been ever since the Revolution, that the communication has been subsequent to the arrest. 1 *Comm. c. 2.*

V. 1. ONE very antient privilege of Peers, considered as members of Parliament, is that declared by the charter of the Forest, (*cap. 11.*) confirmed in Parliament, 9 *H. 3: viz.* That every Lord, spiritual or temporal, summoned to Parliament, and passing through the King's forests, may, both in going and returning, kill one or two of the King's deer without warrant; in view of the forester, if he be present, or on blowing a horn, if he be absent; that he may not seem to take the King's venison by stealth. 1 *Comm. c. 2.*

In the next place they have a right to be attended, and constantly are, by the Judges of the Courts of K. B. and C. P. and such Barons of the Exchequer as are of the degree of the coif, or have been made serjeants at law; as likewise by the King's learned Counsel being serjeants, and by the Masters of the Court of Chancery; for their advice in point of law, and for the greater dignity of their proceedings. [The Lord Chancellor is usually the Speaker of the House.] The Secretaries of State, with the Attorney and Solicitor General, were also used to attend the House of Peers, and have to this day (together with the judges, &c.) their regular writs of summons, issued out at the beginning of every Parliament, *ad tractandum & consilium impendendum*, though not *ad consentiendum*; but whenever, of late years, they have been members of the House of Commons, their attendance here hath fallen into disuse. See *stat. 31 H. 8. c. 10: Moor 551: 4 Inst. 4, 48: Hale of Parl. 140.* On account of this attendance there are several resolutions, before the Restoration, declaring the Attorney General incapable of sitting among the Commons. See *post VI. (B) 2.* Sir Henry Finch, member for the University of Oxford, afterwards Lord Nottingham, and Chancellor, was the first Attorney General who enjoyed that privilege. *Sim. 28.*

Another privilege is, that every Peer, by licence obtained from the King, may make another Lord of Parliament his *proxy*, to vote for him in his absence. *Seld. Baronage, p. 1. c. 1.* A privilege which a member of the other House can by no means have; as he is himself but a proxy for a multitude of other people. 4 *Inst. 12.* This licence had long ceased in Ireland, but the proxies in the House of Lords are still entered, in Latin, *ex licentiâ regis.* This created a doubt in Nov. 1788, whether the proxies in that Parliament were legal, on account of the King's illness. 1 *Ld. Mountm. 342.* But it seems now to be so much a mere form, that the licence may be presumed, though instances are on record where they have been denied by the King, particularly, *An. 6, 27 & 39 E. 3.* Proxies cannot be used in a committee. *Ib. 106.* A proxy cannot sign a protest in England; but he can in Ireland. 2 *Ld. Mountm. 191.* The order that no Lord should have more than two proxies, (*i. e.* be a proxy for more than two ab-

sent Lords,) was made *anno* 2 *Car.* 1. because the Duke of *Buckingham* had no less than fourteen. 1 *Rushw.* 269. There is an instance, in *Wight* 50, where a proxy is called *litera attornatus ad Parliamentum*; which it is in effect. The Peer who has the proxy is always called, in Latin, *procurator*. If a Peer, after appointing a proxy, appears personally in Parliament, his proxy is revoked and annulled. 4 *Inst.* 13. By the orders of the House no proxy shall vote upon a question of "guilty or not guilty:" and a spiritual Lord shall only be proxy for a spiritual Lord, and a temporal Lord for a temporal. Two or more Peers may be proxy for one absent Peer; but *Coke* is of opinion, that they cannot vote, unless they all concur. 4 *Inst.* 12: 1 *Wood.* 41.

Each Peer has also a right, by leave of the House, when a vote passes contrary to his sentiments, to enter his dissent on the Journals of the House with the reasons for such dissent, which is usually styled his Protest. 1 *Comm. c.* 2. Lord *Clarendon* relates, that the first instances of protests, with reasons, in *England* were in 1641; before which time they usually only set down their names as dissentient to the vote. The first regular protest in *Ireland* was in 1662. 1 *Ld. Mountm.* 402.

All bills likewise that may, in their consequences, any way affect the right of the peerage, are by the custom of Parliament to have their first rise and beginning in the House of Peers; and to suffer no changes or amendments in the House of Commons.

There is also one statute peculiarly relative to the House of Lords, which regulates the election of the sixteen representative Peers of *North Britain*, in consequence of the twenty-second and twenty-third articles of the Union; and for that purpose prescribes the oaths, &c. to be taken by the electors; directs the mode of balloting; prohibits the Peers electing from being attended in an unusual manner; and expressly provides, that no other matter shall be treated of in that assembly, save only the election, on pain of incurring a *fræmunire*. *Stat.* 6 *Ann. c.* 52.

2. Considered in its judicial capacity, the House of Peers is the supreme Court of judicature in the kingdom; having at present no original jurisdiction over causes, but only upon appeals and writs of errors; to rectify any injustice or mistake of the law committed by the Courts below. But this House has original *criminal* jurisdiction in the cases of *impeachment* by the Commons, and of the trial of *Peers*. See this Dictionary under those titles: and see *ante* IV. 1.

To this authority, this august tribunal succeeded of course upon the dissolution of the *Aulia Regia*; for as the Barons of Parliament were constituent members of that Court, and the rest of its jurisdiction was dealt ought to other tribunals, over which the great officers who accompanied those barons were respectively delegated to preside; it followed, that the right of receiving appeals, and superintending all other jurisdictions, still remained in the residue of that noble assembly, from which every other great Court was derived. They are, therefore, in all causes the last resort, from whose judgment no further appeal is permitted; but every subordinate tribunal must conform to their determinations; the law reposing an entire confidence in the honour and conscience of the noble persons who compose this important assembly, that (if possible) they will make themselves masters of those questions, upon which they undertake to decide;

and in all dubious cases refer themselves to the opinions of the Judges, who are summoned by writ to advise them; since upon their decision all property must finally depend. 3 *Comm. c. 4. p. 57.* See also *stats. 27 Eliz. c. 8. & 31 Eliz. c. 1.*

To this judicial capacity *Blackstone* refers the tribunal established by *stat. 14 E. 3. c. 5.* consisting (though now out of use) of one prelate, two earls, and two barons, who are to be chosen at every new Parliament, to hear complaints of grievances and delays of justice in the King's Courts; and (with the advice of the Chancellor, Treasurer and justices of both benches) to give directions for remedying those inconveniences in the Courts below. See also *stats. 27 Eliz. c. 8. & 31 Eliz. c. 1.* This Committee seems to have been established, lest there should be a defect of justice, for want of a supreme Court of appeal, during any long intermission or recess of Parliament; for the statute further directs, "that if the difficulty be so great that it may not well be determined, without assent of Parliament, it shall be brought by the said prelate, earls, and barons unto the next Parliament, who shall finally determine the same." 3 *Comm. 58.*

It has been well hinted, to all the members of this supereminent judicature, that when they are declaring what is the law of Parliament, their character is totally different from that with which, as Legislators, they are invested, when they are framing new laws; and that they ought never to forget the admonition of that great and patriotic chief justice Lord *Holt*, viz. "That the authority of Parliament is from the law, and as it is circumscribed by law, so it may be exceeded; and if they do exceed those legal bounds and authority, their acts are wrongful, and cannot be justified any more than the acts of private men." 1 *Salk. 505.* And for the position, that Parliament in their judicial capacity, are governed by the common and statute laws, as well as the Courts in *Westminster-Hall*; see 4 *Inst. 14, 15: 2 St. Tr. 735.*

In the case of the Bishop of *London v. Efytche* it was determined, that a general Bond of resignation (given by the Clergyman to the Patron on his being presented to a living) is simoniacal and illegal: and the House of Lords reversed the judgments of the Courts of C. P. and K. B. to the contrary, though founded on a series of judicial decisions, by which these courts held themselves bound to decide that such Bond was not illegal. The question arose on the words of the *stat. 31 Eliz. c. 6.* Some dissatisfaction has been expressed at this determination of the Lords: and it has been supposed, that a different judgment might be given on a future occasion. See *Cases in Parliament, 8vo. title Clergy, Ca. 3.* But it is generally understood that the Lords, to prevent inconsistencies in their judgments, will never permit a question of law, once decided in that house, to be debated again. With respect to the influence which the judgments of the inferior Courts ought to have upon the House of Lords, it has been suggested that a distinction may be made between cases arising merely on the Common Law, and cases which depend on the construction of a statute. A series of decisions in the Courts are the best evidence of the Common Law: and the Lords cannot find any adequate authority to oppose to these decisions in justification of their reversal: but upon the construction of a statute where there is no reason to suspect any variation from the original, they seem as fully competent to determine a question, after any number of decisions in the Courts below, as after the first; and the length of the series can operate no farther

than as an object of general convenience. See 2 *Comm. c. 18. and the note there.*

On the general question of the Jurisdiction of the Lords' House of Parliament; see Lord *Hale's* Treatise on that subject, and Mr. *Hargrave's* learned Preface prefixed. Mr. *Hargrave*, after recounting the various contests between the two Houses of Parliament on this subject, states the result in the following terms.

From the year 1717 there has been an absolute cessation of hostility between the Lords and Commons on the right of Judicature in Parliament. The Lords have ceased to encourage interference with the judicature of the Commons over the rights of election—ceased to meddle with original jurisdiction—ceased to countenance attempts to introduce original causes under the disguise of being Appellants—ceased to extend their exercise of appellant jurisdiction beyond examining judgments at law under writs of error; and decrees of Courts of Equity upon petition of appeal—ceased to meddle with appeals from sentences of Ecclesiastical Courts, and other courts of special jurisdiction—ceased to advance claims of universal jurisdiction, both original and appellant—ceased to state themselves as being the virtual, absorbing, and inherent representatives of the King and Commons in matter of judicature, and in effect for that purpose the full and whole Parliament; and as such the supreme and last resort. On the other hand, the Commons have ceased to interrupt the exercise of appellant jurisdiction by the Lords over the decrees of Courts of Equity—nay, they have even forborne to revive considering the right of the Lords to *fine* the Commons of *England* for breach of privilege, and to imprison them on that account beyond the sitting of Parliament: notwithstanding the objections heretofore so strongly urged against both of these practices; and notwithstanding the laudable abstinence of the Commons themselves from attempting to vindicate the breach of their own privileges, otherwise than by an imprisonment, which, if not sooner determined by their own act, of course ceases when Parliament is either dissolved or prorogued. Thus at length the Lords have so long acquiesced in the condemnation of their exercise of *original* jurisdiction, that it seems as if they had never claimed it: and the Commons have so long acquiesced in the exercise of *appellant* jurisdiction by the Lords, that it now seems as if it had never been disputed; and however irregular that appellant judicature might be in its origin, it has obtained sanction from long practice.

By the Writ of Error as now in use, and which appears to have continued, in the same form, from at least the year 1624, after mentioning the King's being informed of error, the King commands the record and process to be sent into Parliament, "that inspecting the record and process aforesaid we may cause further to be done thereupon by the assent of the Lords Spiritual and Temporal, in the same Parliament assembled, for amending the said error, as of right, and according to the law and custom of *England* shall be meet to be done."

VI. (A) As the House of Lords seems to be politically constituted, for the support of the rights of the Crown; so the province of the House of Commons is to stand for the preservation of the People's liberties. The Commons, in making and repealing laws, have equal

power with the Lords; and for laying taxes on the Subject, the bill is to begin in the House of Commons. And as formerly the laying and levying of new taxes have caused rebellions and commotions, this has occasioned, (particularly *anno* 9 *E.* 3.) when a motion has been made for a subsidy of a new kind, that the Commons have desired a conference with those of their several counties and places, whom they have represented, before they have treated of any such matters. 4 *Inst.* 34.

It is the antient indisputable privilege and right of the House of Commons, that all grants of subsidies or parliamentary aids, do begin in their House, and are first bestowed by them; although their grants are not effectual, to all intents and purposes, until they have the assent of the other two branches of the Legislature. 4 *Inst.* 29. The general reason given, for this exclusive privilege of the House of Commons, is, that the supplies are raised upon the body of the people, and therefore it is proper that they alone should have the right of taxing themselves. This reason would be unanswerable if the Commons taxed none but themselves; but it is notorious, that a very large share of property is in the possession of the House of Lords; that this property is equally taxable, and taxed, as that of the Commons; and therefore the Commons not being the *sole* persons taxed, this cannot be the reason of their having the *sole* right of raising and modelling the supply. The true reason, arising from the spirit of our constitution, seems to be this; the Lords being a permanent hereditary body, created at pleasure by the King, are supposed more liable to be influenced by the Crown, and when once influenced, to continue so, than the Commons, who are a temporary elective body, freely chosen by the people; it would therefore be extremely dangerous to give the Lords any power of framing new taxes for the subject; it is sufficient that they have a power of rejecting, if they think the Commons too lavish or improvident in their grants. But, so reasonably jealous are the Commons of this valuable privilege, that herein they will not suffer the other House to exert any power, except that of rejecting. They will not permit the least alteration or amendment to be made by the Lords to the mode of taxing the people by a money bill; under which appellation are included all bills by which money is directed to be raised upon the Subject, for any purpose, or in any shape whatsoever; either for the exigencies of Government, and collected from the kingdom in general, as the land-tax; or for private benefit, and collected in any particular district, as by turnpikes, parish rates, and the like. This rule is even extended to all bills for canals, paving, provision for the poor, and to every bill in which tolls, rates, or duties are ordered to be collected; and also to all bills in which pecuniary penalties and fines are imposed for offences. 3 *Hats.* 110. But perhaps it is carried beyond its original spirit and intent, when the money raised is not granted to the Crown. Yet Sir *Matthew Hale* mentions one case, founded on the practice of Parliament in the reign of *Henry VI.* wherein he thinks the Lords may alter a money bill; and that is, if the Commons grant a tax, as that of tonnage and poundage, for *four years*; and the Lords alter it to a less time, as for *two years*; here, he says, the bill need not be sent back to the Commons for their concurrence, but may receive the royal assent without farther ceremony; for the alteration of the Lords is consistent with the grant of the

Commons. See *Hale on Parliaments*, 65, 6: *Year-Book*, 33 *Hen.* 6, 17. But such an experiment will hardly be repeated by the Lords, under the present improved idea of the privilege of the House of Commons; and, in any case where a money bill is remanded to the Commons, all amendments in the mode of taxation are sure to be rejected. And, even if the Commons desire to agree with the amendment, the form is to reject the bill so amended by the Lords, and to bring in a *new* bill containing those amendments, solely for the purpose of preserving the privileges of the Commons. See *post* VII. Upon the application of this rule, there have been many warm contests between the Lords and Commons, in which the latter seem always to have prevailed. See many conferences collected by Mr. *Hatsell*, in his Appendix to the third volume, and particularly in Appendix D; the conference of 20 and 22 *April* 1671; the general question is debated with infinite ability on both sides, but particularly on the part of the Commons, in an argument, drawn up by Sir *Heneage Finch*, then Attorney General; and who there answers the case alluded to by *Hale* from the *Year-Book*.

VI. (B) 1. In the election of knights, citizens, and burgesses, to represent the counties, cities, and boroughs of the kingdom, consists the exercise of the democratical part of the *British Constitution*: the only true *Sovereignty of the People* being shewn in their choice of their representatives. This choice is, therefore, a matter of such high importance, to the preservation of rational freedom, that the laws have very strictly guarded against any usurpation or abuse of this power by many salutary provisions; which shall be here considered according to the division of the subject made at the beginning of this article.

The true reason of requiring any qualification, with regard to property in voters is, to exclude such persons as are in so mean a situation, that they are esteemed to have no will of their own. If these persons had votes, they would be tempted to dispose of them under some undue influence or other. This would give a great, an artful, or wealthy man a larger share in elections than is consistent with general liberty. If it were probable that every man would give his vote freely, and without influence of any kind, then, upon the true theory and genuine principles of liberty, every member of the community, however poor, should have a vote; in electing those delegates, to whose charge is committed the disposal of his property, his liberty, his life. But since that can hardly be expected in persons of indigent fortunes, or such as are under the immediate dominion of others, all popular States have been obliged to establish certain qualifications, whereby some who are suspected to have no will of their own, are excluded from voting; in order to set other individuals, whose wills may be supposed independent, more thoroughly upon a level with each other. 1 *Comm. c.* 2. *ft.* 171.

This constitution of suffrages is framed upon the wisest principle; steering between the two extremes of too much regard to property on the one hand, or to mere numbers on the other. Only such persons are entirely excluded from being electors as can have no will of their own; there is hardly a free agent to be found who is not, [or may not if he pleases,] be entitled to a vote in some place or other of the kingdom. Nor is comparative wealth or property entirely dis-

regarded in elections; for though the richest man has only one vote at one place, yet if his property be at all diffused, he has probably a right to vote at more places than one, and therefore has many representatives. This, says *Blackstone*, is the spirit of our Constitution; not that it is, in fact, quite so perfect as described; for, he candidly adds, if any alteration might be wished or suggested in the present frame of Parliaments, it should be in favour of a more complete representation of the people. 1 *Comm. c. 2. p. 171*. Perhaps this has been already, in some degree, accomplished; and as one step towards it, and more particularly in order to preserve the right of election as much as possible from being made the instrument of undue influence, it is enacted by *stat. 22 Geo. 3. c. 41.* that no person employed in managing or collecting the duty of excise, customs, stamps, salt, windows, or houses, or the revenue of the post-office, in *Great Britain*, shall vote at any election; and if such person presumes to vote, he shall forfeit 100*l.* By *stat. 43 G. 3. c. 25.* a like incapacity with like penalty is enacted as to officers employed in any department of the revenue in *Ireland*. These acts do not extend to freehold offices granted by letters patent.

(a). To consider, therefore, *first*, the qualifications of *Electors of Knights of the Shire*; or as they are more commonly termed, Members for the Counties: in *Great Britain*.

By *stats. 8 H. 6. c. 7: 10 H. 6. c. 2;* (amended by *stat. 14 Geo. 3. c. 58.* which made the *residence* of the electors and the elected in their respective counties, cities, and boroughs no longer necessary;) the knights of the shire shall be chosen by people, whereof every man shall have freehold, to the value of 40*s.* by the year within the county; which, by subsequent statutes, is to be clear of all charges and deductions, except parliamentary and parochial taxes.

The *stat. 7 & 8 W. 3. c. 25.* requires, that every freeholder shall take an oath that he is a freeholder of the county, and has freehold lands or hereditaments of the yearly value of 40*s.* lying at such a place, within the said county, and that he hath not before polled at the election.

The voter's evidence of the value must, therefore, be received at the poll; but it is not conclusive, and may be contradicted by other evidence, upon a scrutiny or before a committee. The *stat. 18 G. 2. c. 18. § 6.* expressly declares, that public taxes are not to be deemed charges payable out of the estate; and therefore it might be thought to be the plain and obvious construction of the act, that wherever a freeholder has an estate which would yield him 40*s.* before these taxes are paid, or for which he would receive a rent of 40*s.* if he paid the taxes himself, he would have a right to vote: yet an election-committee of the House of Commons [see *post.* VI. (B) 3] has decided, that where a tenant paid a rent, less than 40*s.* but paid parochial taxes, which, added to the rent, amounted to more than 40*s.* the landlord had no right to vote. 2 *Lud. 475*. Two committees have held that the interest of a mortgage is a charge, which, if it reduces the value under 40*s.* takes away the vote; though there is an intermediate decision of a committee in which the contrary was held.

The Knights of Shires are the representatives of the landholders or landed interest of the kingdom; their electors must therefore have estates in lands or tenements within the county represented; these

estates must be freehold, that is, for term of life at least; because beneficial leases for long terms of years were not in use at the making of these statutes; and copyholders were then little better than villeins, absolutely dependent on their lords. This freehold must be of 40*s.* annual value; because that sum would, at the time of passing the statutes, with proper industry, furnish all the necessities of life, and render the freeholder, if he pleased, an independent man. 1 *Comm.* 172. So that it should seem the first step towards a parliamentary reform, would be rather to restrain, than enlarge, the qualifications of electors; 40*s. per ann.* in the time of *Hen.* 6. being equal to 20*l.* or more of the present day. A consideration not much adverted to, at least not brought forward, by those who seem very anxious to new-model Parliament according to its antient constitution.

The other less important qualifications of the electors for counties in *England* and *Wales* may be collected from the following statutes, viz. *stats.* 7 & 8 *W.* 3. c. 25: 10 *Ann.* c. 23: 2 *Geo.* 2. c. 24: 18 *Geo.* 2. c. 18: 19 *Geo.* 2. c. 28: 31 *Geo.* 2. c. 14: 3 *Geo.* 3. c. 24: 20 *Geo.* 3. c. 17: and 30 *Geo.* 3. c. 35. These statutes direct;

That no person under twenty-one years of age shall be capable of voting for any member. This extends to all sorts of members, as well for boroughs as counties, as does also the next, viz.

That no person convicted of perjury, or subornation of perjury, or of having asked or received any bribe, shall be capable of voting in any election. *Stat.* 2 *Geo.* 2. c. 24. § 6, 7.

That no person shall vote in right of any freehold, granted to him fraudulently, to qualify him to vote. Fraudulent grants are such as contain an agreement to re-convey, or to defeat the estate granted; which agreements are made void, and the estate is absolutely vested in the person to whom it is so granted. And every person who shall prepare or execute such conveyance, or who shall give his vote under it, shall forfeit 40*l.* *Stat.* 10 *Ann.* c. 23. § 1.

To guard the better against such frauds, it is further provided, that every voter shall have been in the actual possession or receipt of the profits of his freehold, to his own use, for twelve calendar months before; except it came to him by descent, marriage, marriage-settlement, will, or promotion to a benefice or office.

That no person shall vote, in respect of an annuity or rent-charge, unless registered with the clerk of the peace twelve calendar months before. Such annuity or rent-charge to be issuing out of a freehold estate; and if it accrues or devolves, by operation of law, within a year before the election, a certificate of it to be entered with the clerk of the peace, before the first day of the election. *Stat.* 3 *Geo.* 3. c. 24: *Heyw.* 145.

That in mortgaged or trust estates, the person in possession, under the above-mentioned restrictions, shall have the vote.

That only one person shall be admitted to vote for any one house or tenement; to prevent the splitting of freeholds, and multiplying votes for election purposes. But this does not extend to cases which arise from operation of law, as devises, descents, &c. As if an estate should descend to any number of females, the husband of each would have a right to vote, if his interest amounted to 40*s.* a-year. And by *stat.* 20 *Geo.* 3. c. 17. § 12. a husband may vote for his wife's right of dower, without an actual assignment of it by metes and bounds. It may happen that two or more votes may be given, successively, for

the same estate or interest, at the same election; as where a freeholder votes and dies, his heir or devisee may afterwards vote at the same election. And it seems to be generally true, that where no length of possession is required, by any act of Parliament, the elector may be admitted to vote, though his right accrued since the commencement of the election. 1 *Dougl.* 272: 2 *Lud.* 427.

That no estate shall qualify a voter, unless the *estate* has been, at all events, assessed to some land-tax aid for at least twelve months next before the election; and, for six months before the election, either in the name of the voter, or his tenant, or of the tenant actually occupying the same; but if he has acquired it by marriage, descent, or other operation of law, in that case it must have been assessed to the land-tax, within two years before the election, either in the name of the predecessor, or person through whom the voter derives his title, or in the name of the tenants of such person, or in the name of the tenant actually occupying the same. And see *stat.* 30 *Geo.* 3. c. 35; by which it is provided, that a person may vote for lands, &c. assessed for six months in his own (*i. e.* the voter's) name, or for lands coming by descent, &c. assessed within two years in the name of his predecessor, &c. *though the name of the tenant is not mentioned.* And a person may vote for lands, assessed for six months in the name of the actual tenant, *though the name of the voter, or his predecessor, &c. is not mentioned.* The statutes do not extend to fee-farm rents, (duly registered and issuing out of assessed lands,) chambers in Inns of Courts, or seats belonging to public offices, which are not usually assessed to the land-tax.—See also 42 *Geo.* 3. c. 116. § 200. that persons claiming to vote for lands, &c. where the land-tax has been redeemed (see title *Land-tax*), shall be entitled to vote upon proving such redemption.

In *Ireland*, the electors of the Knights of the Shire must have 40*s.* a-year freehold in the county: and such freehold must be duly registered. See the *Irish* acts, 33 *H.* 8. *st.* 2. c. 1. § 2: 35 *Geo.* 3. c. 29: 37 *Geo.* 3. c. 47: and the act 45 *Geo.* 3. c. 59.

That no tenant by copy of Court-roll shall be permitted to vote as a freeholder. See title *Copyhold*.

(b). The *Electors of Citizens and Burgesses* are supposed to be the mercantile part, or trading interest of the kingdom. But as trade is of a fluctuating nature, and seldom long fixed in a place, it was formerly left to the Crown to summon, *pro re natâ*, the most flourishing towns to send representatives to Parliament. So that as towns increased in trade, and grew populous, they were admitted to a share in the Legislature. But the deserted boroughs continued to be summoned as well as those to whom their trade and inhabitants were transferred; except a few, which petitioned to be eased of the expense, then usual, of maintaining their members; 4*s.* a day being allowed for a knight of the shire, and 2*s.* for a citizen or burgess; which was the rate of wages established in the reign of *Edward III.*: 4 *Inst.* 16. Hence the members for boroughs now bear above a quadruple proportion to those for counties; and the number of Parliament-men is increased since *Fortescue's* time, in the reign of *Henry VI.* from 300 to upwards of 500, exclusive of those for *Scotland* and *Ireland*. The Universities were in general not empowered to send burgesses to Parliament; though once in 28 *E.* 1. when a Parliament was summoned to consi-

der the King's right to *Scotland*, there were issued writs which required the University of *Oxford* to send up four or five, and that of *Cambridge* two or three, of their most discreet and learned lawyers for that purpose. *Prynne Parl. Writs*, i. 345. But it was King *James I.* who indulged them with the permanent privilege, to send constantly two of their own body, to serve for those students, who, though useful members of the community, were neither concerned in the landed nor the trading interest; and to protect, in the Legislature, the rights of the Republic of Letters. 1 *Comm. c. 2. p. 174.*

Mr. *Christian*, in his note on the above passage, quotes *Prynne*, to shew that the wages formerly given to members of Parliament had no other origin than that principle of natural equity and justice, *qui sentit commodum sentire debet et onus*. Mr. *Christian* suggests, that representation, at the first, was nothing more than the attendance of part of a number who were all individually bound to attend, and where the attendance of the rest was dispensed with; and as all were under the same obligation to render this service, and it was left to themselves to determine which of them should undertake it, it became equitable, that all should contribute to the expense and inconvenience incurred. *Prynne* says, the first writs *de expensis militum, &c.* are coeval with our Kings' first writs of summons to elect and send knights, citizens, and burgesses to Parliament, *viz. anno 49 Hen. 3.*; before which there are no memorials of either of those writs. These expenses were reduced to the certainty above-mentioned, of 2*s.* and 4*s. per* day, in the 16th of *E. II.*; though there are some instances where a less sum was allowed; and even one in 3 *E. 4.* 1463, where Sir *John Strange*, the member for *Dunwich*, agreed to take a cade and half a barrel of herrings as a composition for his wages. *Glanv. Ref. Pref. p. 23.*

Andrew Marvell, member for *Hull*, in the Parliament after the Restoration, was, it is said, the last member who received these wages; and they were formerly of so much consequence, that many boroughs petitioned to be excused from sending members to Parliament, on account of the expense. *Pryn. on 4 Inst. 32.* And from 33 *E. 3.* uniformly through the five succeeding reigns, the Sheriff of *Lancashire* returned, that there were no cities or boroughs in his county that ought or were used, or could, on account of their poverty, send any citizens or burgesses to Parliament. 1 *Comm. c. 174, in n.*

By reason of these exemptions, and new creations, by royal charter, which commenced in the reign of *Ed. IV.* who, in the 17th year of his reign, granted to the borough of *Wenlock* the right of sending one burgess to Parliament, (*Sim. 97.*) the number of the members of the House of Commons perpetually varied. *Charles II.* in the 29th year of his reign, granted, by his charter, to *Newark*, the privilege of sending representatives to Parliament; and this was the last time that this prerogative of the Crown was exercised. 1 *Dougl. El. 69.* Since the beginning of the reign of *Henry VIII.* the number of the representatives of the Commons has been more than doubled; for in his first Parliament the house consisted only of 298 members: 360 have since been added by acts of Parliament, or by the King's charter, either creating new, or reviving old boroughs. Under the provision of the acts 27 *H. 8. c. 26. § 29* & 34, 35 *H. 8. c. 26. § 27.* there were added 24 for *Wales*; 12 precisely by the first act for the counties, and 12 under the provision of the latter act for the boroughs. Two for the

county, and two for the city of *Chester*, were added by *stat. 34, 35 Hen. 8. c. 13*. Two for the county, and two for the city of *Durham*, by *stat. 25 Car. 2. C. 9*:—45 for *Scotland*, by the acts of union with that Kingdom; and 100 for *Ireland*, by the acts of union with that Kingdom; and the remainder by charter.

The number of the House of Commons may therefore be stated thus:

	Members.
In the first Parliament of <i>Hen. VIII.</i> - - -	298
Created since by positive statute, - - -	168
Created or restored by charter, &c. <i>viz.</i> by <i>Hen. VIII. 16: by Ed. VI. 48: Mary, 21: Eliz. 60:</i>	192
<i>Jac. I. 27: Car. I. 18: Car. II. 2.</i>	

Of these, there are elected

For <i>England</i> - - - - -	489
<i>Ireland</i> - - - - -	100
<i>Scotland</i> - - - - -	45
<i>Wales</i> - - - - -	24

The number of places, which send members, and the numbers of knights, citizens, burgesses, and barons, respectively sent by the several counties, cities, boroughs, and places throughout the United Kingdom, will appear by the following statement:

117 Counties.	{	England	40	} 2 each	{ 80	} Knights, (in Scotland also called Com- missioners) of Shires.	} 186		
		Ireland	32					{ 27	
		Scotland	27	1 each					
			6	3 alternately	3				
		Wales	12	1 each	12				
		<hr/> Total		117 Counties					
32 Cities.	{	England	{ 23	2 each	46	} Citizens	} 60		
			1		4				
		Ireland	{ 2	2 each	4				
			5	1 each	5				
		Scotland	1		1				
222 Boroughs	{	England	{ 165	2 each	330	} Burgesses	} 396		
			1		4				
		Ireland	{ 5	1 each	5				
			26	1 each	26				
		Scotland	14	{ Dis- tricts } 1 each	14				
		Wales	{ 10	1 each	10				
3 Uni- versities.	{	England	2	2 each	4				
		Ireland	1		1				
8 Cinque Ports, &c.	{	England	{ 5 Ports	} 2 each	{ 10			} Barons	} 16
			3 Branches						

382 Places - - - choose - - - Members 658

In *England*, *London* is the city which sends four members; the city of *Ely* does not send one; *Weymouth* and *Melcombe-Regis* is the

borough sending four members; the five boroughs sending one member each, are *Abingdon*, *Banbury*, *Bedley*, *Higham-Ferrers*, and *Monmouth*; the Universities are *Oxford* and *Cambridge*; the Cinque Ports are *Hastings*, *Dover*, *Sandwich*, *Romney* and *Hithe*; and the three branches, *Rye*, *Winchelsea*, and *Seaford*. In *Scotland*, the six counties sending alternately are *Bute* and *Caithness*, *Nairne* and *Cromartie*, *Clacmanan* and *Ross*, each two sending one alternately; *Edinburgh* is the city sending one. In *Ireland*, the cities sending two are *Dublin* and *Cork*; those sending one are *Kilkenny*, *Limerick*, *Londonderry*, *Cashel* and *Waterford*; the university is *Dublin*. In *Wales*, *Pembroke* is the borough sending two; *Merioneth* does not send one.

The right of election in boroughs is various; depending entirely on several charters, customs, and constitutions of the respective places, which have occasioned infinite disputes. In some measure to prevent this evil, the *stat. 7 & 8 W. 3. c. 7.* enacted, that the determination of the House of Commons, (the old judicature in cases of contested elections,) as to the right of election, should bind the returning officer, in taking the poll. That statute was enlarged by *stat. 2 Geo. 2. c. 24.* by the 4th section of which the last determination of the House of Commons was declared to be final. The statutes which established the modern judicature of election-committees, did not transfer to them the same power of specially determining on the right of election; but by *stats. 28 Geo. 3. c. 52. § 25—30: 34 Geo. 3. c. 83.* such committees are invested with the power of binding, by their decision, the right of election; and of appointing a returning officer where the right is litigated; subject to an appeal, by petition to the House within fourteen days after the commencement of the next sessions, and not otherwise. Such petition to be referred to another committee of the House, to be chosen according to the regulations of the said statutes. The determination of such appellate committee, (or of the first committee, if not appealed against,) is now, therefore, conclusive in all subsequent elections. See *post* 3.

By *stat. 3 Geo. 3. c. 15.* no freeman of the city or borough (other than such as claim by *birth*, *marriage*, or *servitude*;) shall be entitled to vote therein, unless he hath been admitted to his freedom twelve calendar months before. This is called the *Durham Act*, and it was occasioned by the Corporation of *Durham* having, upon the eve of an election, in order to serve one of the candidates, admitted 215 honorary freemen. Some corporations have the power of admitting honorary freemen, *viz.* persons who, without any previous claim or pretension, are admitted to all the franchises of the corporation. The *Durham Act* is confined to persons of that description solely. It has frequently been contended, that if honorary freemen are created for the occasion, that is, merely for an election purpose, it is a fraud upon the rights of election; and that, by the Common Law, as in other cases of fraud, the admission and all the consequences would be null and void; that within the year, by the statute, fraud was presumed; but that after that time, the statute left the necessity of proving it upon those who imputed it. But in the *Bedford* case, the committee were clearly of opinion, that the objection of occasionality did not lie against freemen made above a year before the election. *2 Dougl. El. 91.* As to the right of election in the borough of *New Shoreham*, see *stat. 11 Geo. 3. c. 55.* and in the city of *Coventry*, *stat. 21 Geo. 3. c. 54.*

No length of possession is required from voters in burghage, tenure-boroughs. There are about 29 burghage-tenure boroughs in *England*, 1 *Dougl.* 224. In these the right of voting is annexed to some tenement, house or spot of ground, upon which a house in antient times has stood. Any number of these burghage-tenure estates may be purchased by one person, which, at any time before a contested election, may be conveyed to so many of his friends, who would each in consequence have a right to vote.

By *stat.* 26 *Geo.* 3. *c.* 100. it is enacted, that in boroughs, (in *England*;) where the householders or inhabitants of any description claim to elect, no person shall have a right to vote as such inhabitant, unless he has actually been resident in the borough, six months previous to the day on which he tenders his vote. By an *Irish* act, 35 *Geo.* 3. *c.* 29. § 55, &c. inhabitants of boroughs in *Ireland*, claiming to vote, must be registered at the sessions of the county twelve months before the election.

By *stat.* 13 *Geo.* 2. *c.* 20. the statutes for preventing fraudulent conveyances to multiply votes on electing knights of shires, (see *ante a.*) are made to extend to lands or tenements, for which any persons shall vote for the election of members to serve in Parliament for any city or town, *that is a county of itself*; and if any person votes at such election as a freeholder, not having his estate a year before, he is liable to the penalties imposed on unqualified voters at county elections.

It has been already observed, that the question who are or ought to be the electors in boroughs, hath very much exercised the *British* House of Commons: *Anno* 22 *Jac.* 1. it was resolved, that where there is no charter or custom to the contrary, the election in boroughs is to be made by all the householders, and not freeholders only: and in a question whether the Commons, or the capital burgesses of a certain borough in *Lincolnshire*, were the electors of members of Parliament, *anno* 4 *Car.* 1. it was agreed, that the election of burgesses, in all boroughs, did of common right belong to the commoners; and that nothing could take it from them but a prescription and constant usage beyond the memory of man. It has been holden, that the commonalties of cities and burghs are only the ordinary and lower sort of citizens, burgesses or freemen; and that the right of election of burgesses to Parliament in all boroughs, belongs to the commoners, *viz.* the ordinary burgesses or freemen; and not the Mayor, Aldermen, and Common Council; though the meaning of the words *communitates civitatum & burgorum*, has always signified, rightly understood, the Mayor, Aldermen, and Common Council, where they were to be found; or the steward or bailiff, and capital burgesses, or the governing parts of cities and towns, by what persons soever they were governed, or titles called. *Dict.*

VI. (B) 2. As to the qualifications of persons to be *elected* members of the House of Commons, some of these depend upon the law and custom of Parliament, declared by the House of Commons. 4 *Inst.* 47, 8. Others upon certain statutes. And from these it appears,

That they must not be aliens born, 12 & 13 *W.* 3. *c.* 2. § 3.—nor minors, 7 & 8 *W.* 3. *c.* 25. § 8.

They must not be any of the twelve Judges, because they sit in the

Lords' House. But persons who have judicial places in the other Courts, ecclesiastical or civil, are eligible. 4 *Inst.* 47. Nor of the Clergy; the reason assigned for which is, that they might sit in the convocation. Nor persons attainted of treason or felony, for they are unfit to sit any where. 4 *Inst.* 47: 1 *Comm.* 175.

With respect to the Clergy, their right or capacity of sitting in Parliament was for a long time contested; but at length, by 41 G. 3. (*U. K.*) c. 63. it was enacted, that no Person having been ordained to the office of Priest or Deacon, or being a minister of the Church of *Scotland*, shall be capable of being elected to serve in Parliament as a member of the House of Commons. The election of such persons is declared void; and if any person after his election is ordained, he must vacate his seat. The penalty for any person sitting as a member, contrary to this act, is 500*l.* a-day: and proof of having celebrated divine service is declared *prima facie* evidence of the party being ordained, &c.

As attendance of this nature is for the service of the public, the whole nation has such an interest therein, that the King cannot grant an exemption to any person from being elected as a knight, citizen, or burgess in Parliament; and for that elections ought to be free. 29 *Hen.* 6. And persons who are eligible might formerly in all cases, and may still in some, be compelled to serve in Parliament against their consent. See 1 *Doug. El. Ca.* 284.

Sheriffs of counties, and mayors and bailiffs of boroughs, are not eligible in their respective jurisdictions, as being returning officers. *Bro. Abr.* title *Parliament* 7: *Hal. of Parl.* 114. But Sheriffs, of one county are eligible to be knights of another. 4 *Inst.* 48: *Whitelocke on Parl. ch.* 99, 100, 101.

Thus it has been decided, that the Sheriff of *Berkshire* could not be elected for *Abingdon*, a borough within that county. 1 *Doug. El. Ca.* 419. But a Sheriff of *Hampshire* may be elected for the town of *Southampton* within that county; because *Southampton* is a county of itself, and is as independent of *Hampshire* as of any other county. 4 *Doug.* 87. It seems that the expression, that Sheriffs of one county are eligible to be knights of another, is too confined; as they may be also members for any city or borough not in the county for which they are Sheriffs.

The eldest son of a Peer of *Scotland* is incapacitated from being elected to represent a *Scotch* county. *Lord Daer's Case*, 26 *Mar.* 1793. *Parliament Cases*, 8vo.

In strictness, all members ought to have been inhabitants of the places for which they are chosen. *Stats.* 1 *Hen.* 5. c. 1: 23 *Hen.* 6. c. 15; but this having been long disregarded, was at length entirely repealed, as has already been mentioned, by *stat.* 14 *Geo.* 3. c. 58.

No persons concerned in the management of any duties or taxes, created since 1602, (except the commissioners of the treasury, *stat.* 5 *W. & M.* c. 7. § 57;) nor any of the officers following, *viz.* commissioners of prizes, transports, sick and wounded, wine licences, navy and victualling; secretaries, or receivers of prizes; comptrollers of the army accounts; agents for regiments; governors of plantations, and their deputies; officers of *Minorca* or *Gibraltar*; officers of the excise and customs; clerks or deputies in the several offices of the treasury, exchequer, navy, victualling, admiralty, pay of the army or navy, secretary of state, salt, stamps, appeals, wine-licences, hackney-coaches, hawkers, and pedlars; nor any persons that hold any new

office or place of profit under the Crown since 1705, are capable of being elected or sitting as members. See *stats.* 11 & 12 *W. 3. c. 2.* § 150, 151, 152; 12 & 13 *W. 3. c. 10.* § 89, 90; 6 *Ann. c. 7.* § 25—31; 15 *Geo. 2. c. 22.*

No person having a pension under the Crown during pleasure, or for any term of years, is capable of being elected or sitting. *Stat. 6 Ann. c. 7.* § 25; *stat. 1 G. 1. stat. 2. c. 56.*

If any member accepts an office of profit under the Crown, which was in existence prior to 1705, except an officer in the army or navy accepting a new commission, his seat is vacated; but such member is capable of being re-elected. *Stat. 6 Ann. c. 7.* § 26.

All the persons thus enumerated are utterly incapable of sitting in the House of Commons, whilst they continue in their respective situations. But by *stat. 15 Geo. 2. c. 22.* § 3. the treasurer or comptroller of the navy, the secretaries of the treasury, the secretary to the Chancellor of the Exchequer, secretaries of the Admiralty, under-secretary to any of the secretaries of state, deputy pay-master of the army, and persons having an office or employment for life, or during good behaviour, are expressly excepted from the prohibition, and are therefore eligible.

By *stat. 22 Geo. 3. c. 45.* no contractor with the officers of government, or with any other person for the service of the public, shall be capable of being elected, or of sitting in the House, as long as he holds any such contract, or derives any benefit from it. But this does not extend to contracts with corporations, or with companies, which then consisted of ten partners; or to any person to whom the interest of such a contract shall accrue by marriage or operation of law, for the first twelve months. And if any person disqualified by such a contract shall sit in the House, he shall forfeit 500*l.* for every day; and if any person who engages in a contract with government admits any member of Parliament to a share of it, he shall forfeit 500*l.* to the prosecutor. By 39 *G. 3. c. 94.* the Master of the Mint is declared not to be a contractor within the meaning of 22 *G. 3.*

By the *Irish* acts, 33 *Geo. 3. c. 41.* & 38 *Geo. 3. c. 36.* persons are incapacitated from being elected members of Parliament, if holding places, pensions, &c. under his Majesty, or the Lord Lieutenant, upon principles partly similar to those hereinbefore stated as imposed by the *British* acts; but not to so great an extent. By 41 *Geo. 3. (U. K.) c. 52.* it is expressly enacted, that all persons disabled from sitting in the *British* Parliaments shall in future be disabled from sitting in the Parliaments of the United Kingdom of *Great Britain* and *Ireland*, as members for any place in *Great Britain*; and that all persons disabled from sitting in *Irish* Parliaments should be disabled from sitting in the united Parliament for any place in *Ireland*. And the several other incapacities imposed by the *British* acts on *British* members, are enumerated and extended to the members for *Ireland*; with certain modifications.

The office or trust of a member of Parliament cannot be resigned; and every member is compellable to discharge the duties of it, unless he can shew such cause as the House, in its discretion, will think a sufficient excuse for his non-attendance, upon a call of the House; the only way, therefore, of vacating a seat, is by accepting a situation, in consequence of which the law declares his seat vacant. So where members wish to vacate their seats and retire from Parlia-

ment, it is now usual for the Crown to grant them the office of the stewardship of the Chiltern Hundreds. Mr. *Hatsel* observes, "that the practice of accepting this nominal office, which began (he believes) only about the year 1750, has been now so long acquiesced in, from its convenience to all parties, that it would be ridiculous to state any doubt about the legality of such a proceeding; otherwise (he believes) it would be found very difficult, from the form of these appointments, to shew that it is an office of profit under the Crown." 2 *Hats.* 41. It is observable, that the words of the act are, "office, or place of profit;" perhaps, therefore, it is sufficient if the office is new, though not of profit, for in another part of the act the words *office of profit* are used: the distinction may seem trifling, but for a good purpose it may be applicable. This mode of vacating a seat has been repeatedly denied to such members as, for any offences, are liable to expulsion from Parliament; and would thus wish to avoid the disgrace of such expulsion.

All knights of the shire shall be actual knights, or such notable esquires and gentlemen as have estates sufficient to be knights, and by no means of the degree of yeoman. *Stat. 23 Hen. 6. c. 15.* This by the *stat. de militibus*, 1 *E. 2.* was 20*l.* a year, and put in force against those who had 40*l.* a year till 16 *Car. 1. c. 16.* But it is now reduced to a certainty, by ordaining,

That every Knight of a Shire shall have a clear estate of freehold or copyhold, or mortgage, if the mortgagee has been seven years in possession, to the value of 600*l. per annum*; and every Citizen and Burgess to the value of 300*l.*; except the eldest sons of Peers, and of persons qualified to be knights of shires, and except the members for the two Universities. *Stat. 9 Ann. c. 5.* This somewhat balances the ascendancy which the boroughs have gained over the counties, by obliging the trading interest to make choice of landed men; and of this qualification the member must make oath, and give in the particulars in writing, at the time of his taking his seat. But this act does not extend to *Scotland* nor *Ireland*.

With the exception of these standing restrictions and disqualifications, and some others by particular acts relating to certain special commissioners appointed from time to time for public purposes, every Subject of the realm is eligible of common right; though there are instances wherein persons, in particular circumstances, have forfeited that common right, and have been declared ineligible for that Parliament, by a vote of the House of Commons: (see *ante*;) or for ever, by an act of the Legislature. *Stat. 7 Geo. 1. c. 28.* But it was an unconstitutional prohibition, which was grounded on an ordinance of the House of Lords, and inserted in the King's writs, for the Parliaments holden at *Coventry*, 6 *Henry 4.*, that no apprentice or other man of the law should be elected a knight of the shire therein. 4 *Inst.* 10, 48: *Prynne's Plea for Lords*, 379: 2 *Whitelocke* 359, 368: *Prynne on 4 Inst.* 13. In return for which our law books and historians have branded this Parliament with the name of *Parliamentum indoctum*, or the lack-learning Parliament. And Sir *E. Coke* observes, with some spleen, that there was never a good law made thereat.—*Walsingh. A. D.* 1405: 4 *Inst.* 48.

It is said by some writers, that in antient times the King hath nominated the very persons to be returned, and did not leave it to the election of the people; for which an instance is given in the 45th

year of *Ed. III.* And among the Parliament writs 14 *Eliz.* there appears to be an appointment and return of burgesses by the Lord of a town, &c. But these are single instances in their kind. *Dict.*

3. THE method of proceeding in *Elections* is regulated, from first to last, by the law of Parliament, and a vast variety of statutes; the effect of which is given in the ensuing pages, the provisions of the several statutes being blended together. The following are the *British* statutes on which this abridgment is founded, *viz.* *Stats.* 7 *H.* 4. c. 15: 8 *H.* 6. c. 7: 23 *H.* 6. c. 14: 2 *W. & M.* st. 1. c. 7: 5 & 6 *W. & M.* c. 20: 7 *W.* 3. c. 4: 7 & 8 *W.* 3. cc. 7, 25: 10 & 11 *W.* 3. c. 7: 12 & 13 *W.* 3. c. 10: 6 *Ann.* c. 23: 9 *Ann.* c. 5: 10 *Ann.* cc. 19, 33: 2 *Geo.* 2. c. 24: 8 *Geo.* 2. c. 30: 18 *Geo.* 2. c. 18: 19 *Geo.* 2. c. 28: 10 *G.* 3. c. 16: 11 *Geo.* 3. c. 42: 28 *Geo.* 3. c. 52: and several others, which are occasionally particularized.

In case of a new Parliament, as soon as it is summoned by the King, the Lord Chancellor sends his warrant to the Clerk of the Crown in Chancery; *who thereupon issues out writs to the Sheriff of every county, for the election of all the members to serve for that county, and every city and borough therein.*

If a vacancy happens by the death, &c. of any member during the sitting of Parliament, the Speaker may, by order of the House, send his warrant to the Clerk of the Crown; who thereupon proceeds as in other cases where the warrant is sent by the Lord Chancellor. And with regard to a vacancy happening by death or peerage during the prorogation or recess of Parliament, the *stat.* 24 *Geo.* 3. st. 2. c. 26. which repeals the former statutes upon this subject, provides, that if, during any recess, any two members give notice to the Speaker, by a certificate under their hands, that there is a vacancy by death, or that a writ of summons has issued under the great seal, to call up any member to the House of Lords, the Speaker shall forthwith give notice of it to be inserted in the *Gazette*; and at the end of fourteen days after such insertion he shall issue his warrant to the Clerk of the Crown, commanding him to make out a new writ for the election of another member; but this shall not extend to any case where there is a petition depending for such vacant seat; or where the writ, for the election of the member so vacating, had not been returned fifteen days before the end of the last sitting of the House; or where the new writ cannot issue before the next meeting of the House for the dispatch of business. And to prevent any impediment in the execution of this act, by the Speaker's absence from the kingdom, or by the vacancy of his seat, at the beginning of every Parliament he shall appoint any number of members from three to seven inclusive, and shall publish the appointment in the *Gazette*; these members in the absence of the Speaker shall have the same authority as is given to him by the statute; these are the only cases provided for by act of Parliament; for any other species of vacancy, therefore, no writ can issue during a recess of Parliament.

Within *three days*, (or in the Cinque-Ports within six days, *stat.* 10 & 11 *W.* 3. c. 7.) after the receipt of this writ out of Chancery, the Sheriff is to send his precept, under his seal, to the proper returning officers of the cities and boroughs, commanding them to elect their members; and those returning officers are to proceed to election *within eight days* from the receipt of the precept, giving four days

notice of the same; and to return the persons chosen, together with the precept, to the Sheriff. In the borough of *New Shoreham*, in *Sussex*, wherein certain freeholders of the county are entitled to vote by *stat. 11 Geo. 3. c. 55.* the election must be within twelve days, with eight days' notice of the same.

But elections of Knights of the Shire must be proceeded to by the Sheriffs themselves in person; and, according to former laws, at the next county Court after the delivery of the writ, to be holden at the most usual place in the county. If the county Court fell upon the day of delivering the writ, or within six days after, the Sheriff might have adjourned the Court, and election, to some other convenient time, not longer than sixteen days, nor shorter than ten; but he cannot alter the place without the consent of all the candidates. Now, by *stat. 25 Geo. 3. c. 84.* it is enacted, that the Sheriff having indorsed on the back of the writ the day on which he received it, shall, within two days after the receipt thereof, cause proclamation to be made, at the place where the ensuing election ought by law to be held, of a *special County-Court*, to be there held for the purpose of such election only; on any day, *Sunday* excepted, not later from the day of making such proclamation than the sixteenth day, nor sooner than the tenth; and that he shall proceed on such election, at such special County-Court, in the same manner as if the said election had been held at a County-Court, or at an adjourned County-Court, according to the former laws. And by *stat. 33 Geo. 3. c. 64.* all notices of the time and place of election of members of Parliament shall be publicly given, at the usual place, between eight in the morning and four in the afternoon, from *October 25th* to *March 25th*; and, during the other half year, between eight in the morning and six in the afternoon.

And as it is essential to the very being of Parliament, that elections should be absolutely free, all undue influence whatever upon the electors is illegal and strongly prohibited. As soon, therefore, as the time and place of election within counties, or boroughs, are fixed, all soldiers quartered in the place are to remove, at least one day before the election, to the distance of two miles or more, and not to return till one day after the poll is ended, except in the liberty of *Westminster*, or other residence of the Royal Family, in respect of his Majesty's guards, and in fortified places; *stat. 8 Geo. 2. c. 30. § 3.* Riots likewise have been frequently determined to make an election void. By vote also of the House of Commons no Lord of Parliament, or Lord Lieutenant of a County, hath any right to interfere in the election of Commoners; and, by statute, the Lord Warden of the Cinque-Ports shall not recommend any members there. If any officer of the excise, customs, stamps, or certain other branches of the revenue, presume to intermeddle in elections, by persuading any voter, or dissuading him, he forfeits 100*l.* and is disabled to hold any office. Consistently with the same principle also, it has been decided, that a wager between two electors, upon the success of their respective candidates, is illegal and void; for were it permitted, it would manifestly corrupt the freedom of elections. 1 *Term Rep.* 55.

Indeed, however the electors of one branch of the Legislature may be secured from any undue influence from either of the other two, and from all external violence and compulsion; the greatest danger is that, in which themselves co-operate, by the infamous practice of

bribery and corruption; to prevent which it is enacted, that no Candidate shall, after the date (usually called the *teste*) of the writs; or after the ordering of the writs, that is, after the signing of the warrant of the Chancellor for issuing the writs, (*Sim.* 165;) or after any vacancy, give any money or *entertainment* to his electors, or promise to give any, either to particular persons, or to the place in general, in order to his being elected, on pain of being incapable to serve for that place in Parliament; that is, incapable of serving upon that election. This is provided by *stat. 7 W. 3. c. 4.* commonly called the Treating-Act. It was decided by one committee, that treating vacates the election only; and that the candidate is no way disqualified from being re-elected, and sitting upon a second return. 3 *Lud.* 455. But a contrary determination was made by the *Southwark* committee in the first session of the Parliament, called in 1796; who declared a candidate disqualified on the ground of his having treated at a former election which was declared void for such treating. It has been supposed, that the payment of travelling expenses, and a compensation for loss of time, were not treating, or bribery, within this or any other statute; and a bill passed the House of Commons to subject such case to the penalties imposed by *stat. 2 Geo. 2. c. 24.* upon persons guilty of bribery. But this bill was rejected in the House of Lords by the opposition of Lord *Mansfield*, who strenuously maintained that the bill was superfluous; that such conduct by the laws in being was clearly illegal; and subject, in a Court of law, to the penalty of bribery. 2 *Lud.* 67.

To guard against still more gross and flagrant acts of bribery, it is enacted by *stat. 2 Geo. 2. c. 24.* explained and enlarged by *stats. 9 Geo. 2. c. 38: 16 Geo. 3. c. 11.* that if any money, gift, office, employment, or reward, be given, or promised to be given, to any voter, at any time, in order to influence him to give or withhold his vote, as well he that takes as he that offers such a bribe, forfeits 500*l.* and is for ever disabled from voting at any election for a member of Parliament, and holding any office in any corporation; unless, before conviction, he will discover some other offender of the same kind, and then he is indemnified for his own offence. But these statutes do not create any incapacity of sitting in the House; that depends solely upon the Treating-Act already mentioned.

It has been held, that it is bribery if a Candidate gives an elector money to vote for him, though he afterwards votes for another. 3 *Burr.* 1235. And there can be no doubt but it would also be bribery in the voter; for the words of the statute clearly make the offence mutual. And it has been decided, that such vote will not be available to the person to whom it may afterwards be given gratuitously; though the propriety of this decision has been questioned by respectable authority. 2 *Doug.* 416. An instance is given in 4 *Doug.* 366. of an action in which twenty-two penalties, to the amount of 11,000*l.* were recovered against one defendant.

Besides the penalties, thus imposed by the Legislature, bribery is a crime at Common Law, and punishable by indictment or information; though the Court of King's Bench will not in ordinary cases grant an information within two years, the time within which an action may be brought for the penalties under the statute. 3 *Burr.* 1335. 1359. But this rule does not affect a prosecution by indictment, or information by the Attorney General; who in one case was ordered

by the House to prosecute two persons who had procured themselves to be returned by bribery. They were convicted and sentenced by the Court of King's Bench to pay each a fine of 1000 marks, and to be imprisoned six months. 4 *Doug.* 292.

Undue influence being thus endeavoured to be effectually guarded against, the election is to be proceeded to, on the day appointed; the Sheriff or other returning officer first taking an oath against bribery, and for the due execution of his office. The Candidates, likewise, if required, must swear to their qualification, or their election shall be void; and the electors in counties to theirs; and the electors both in counties and boroughs are also compellable to take the Oaths of Allegiance and Supremacy, (7, 8 *W. 3. c. 25.*) the Oath of Abjuration, and that against bribery and corruption. And it might not be amiss, says *Blackstone*, if the Candidates were bound to take the latter oath, as well as the former; which in all probability, would be much more effectual, than administering it only to the electors.

By *stat. 34 Geo. 3. c. 73: 42 G. 3. c. 62: & 43 G. 3. c. 74.* in order to expedite the business at elections, the returning officers are enabled, on request of the Candidates, to appoint persons to administer to voters the Oaths of Allegiance, Supremacy, the Declaration of Fidelity, the Oath of Abjuration, &c. and all other Oaths required by law, (except the Bribery Oath, which must be taken as required by 2 *Geo. 2. c. 24.*) *previously to their coming to vote*; and to grant the voters certificates of their having taken the said Oaths; without which certificate the voters shall not be permitted to vote, if they are required to take the Oaths.

By *stat. 25 Geo. 3. c. 84.* all electors for cities and boroughs shall swear to their name, addition, or profession, and place of abode; and also, like freeholders in counties, that they believe they are of the age of twenty-one, and that they have not been polled before, at that election. And by the same statute it is enacted, that if a poll is demanded at any election for any county or place in *England or Wales*, it shall commence either that day, or at the farthest upon the next, and shall be continued from day to day (*Sundays excepted*) until it be finished; and that it shall be kept open seven hours at the least, each day, between eight in the morning and eight at night. But should it be continued to the 15th day, then the returning officer shall close the poll at or before three o'clock in the afternoon, and shall immediately, or on the next day, publicly declare the names of the persons who have a majority of votes; and he shall forthwith make a return accordingly, unless a scrutiny is demanded by any Candidate, or by two or more of the electors, and he shall deem it necessary to grant the same; in which case it shall be lawful for him to proceed thereupon; but so as that, in all cases of a general election, (*i. e.* on the calling a new Parliament,) if he has the return of the writ he shall cause a return of the members to be filed in the Crown-Office, on or before the day on which the writ is returnable: if he is a returning officer acting under a precept, he shall make a return of the members at least six days before the day of the return of the writ. But if it is not a general election, then, in case of a scrutiny, a return of the member shall be made within thirty days after the close of the poll; upon a scrutiny the returning officer cannot compel any witness to be sworn, though the statute gives him power to administer an oath to those who consent to take it.

The election being closed, the returning officer in boroughs returns his precept, to the Sheriff; with the names of the persons elected by the majority: and the Sheriff returns the whole, together with the writ for the county, and the names of the Knights elected thereupon, to the Clerk of the Crown in Chancery, before the day of meeting, if it be a new Parliament; or within fourteen days after the election, if it be an occasional vacancy; and this under penalty of 500*l*. If the Sheriff does not return such Knights only as are duly elected, he forfeits, by the old statutes of *Hen. VI.* 100*l*. and the returning officer in boroughs, for a like false return, 40*l*. and they are besides liable to an action, in which double damages shall be recovered, by the latter statutes of King *William*: and any person bribing the returning officer shall also forfeit 300*l*.; but the members returned by him are the sitting members, until upon petition the return shall be adjudged to be false and illegal.

It has been adjudged on *stat. 23 H. 6. c. 7.* that though, according to the statute, no election should be made of any Knight of the Shire, but between eight and eleven of the clock in the forenoon; if the election be begun within that time, and cannot be determined in those hours, it may be made after. And if any electors give their voices before the precept for election is read and published, it will be of no force; for after the precept is thus read, &c. they may alter their voices and make a new election. 4 *Inst.* 48, 49.

By *stat. 10 Ann. c. 23.* it is enacted, that the returning officer, within twenty days after the election, is to deliver over to the clerk of the peace, all the poll books on oath made before two justices; to be preserved among the records of the sessions of the peace, &c.

By the *stat. 7 & 8 W. 3. c. 7.* which gives the action for double damages in case of a false return, all *false* returns, wilfully made, are declared to be illegal; and over and above the remedy which the party grieved has, by action under this statute, the returning officer or other person offending, is punishable by the House; which in such cases has generally committed him to custody, and sometimes to *Newgate*. And the accepting and returning of indentures of return, not signed by the proper returning officer in *Scotland*, has been held a false return, and the Under-Sheriff offending committed. *Sim.* 181, 2.

And in order to prevent the evil of *double returns*, it was by the same *stat. 7 & 8 W. 3. c. 7.* enacted, that if the returning officer return more persons than are required to be chosen by the writ of precept, the same remedy may be had by the party grieved, as in case of a false return. And by § 10 of the *stat. 25 Geo. 3. c. 84.* it is provided, that if *no return* shall be made to a *general writ* on or before the return day, or upon a new writ within fifty-two days after the *teste*, or if a special return be made, the party grieved may petition the House against the same; and a committee shall determine whether any and which of the persons named in such petition ought to have been returned, or whether a new writ ought to issue; and the House shall give the necessary orders. And for any offence against this statute, the returning officer is made liable to a prosecution by information or indictment. And if any returning officer shall wilfully delay, neglect, or refuse duly to return a person elected, such person, on the determination of a committee in his favour, may sue the returning officer, and recover double damages. See *stat. 25 Geo. 3. c. 84.* §§ 11, 14.

Where the right of election is doubtful, and consequently it is uncertain that candidates are duly elected, the returning officer may, and for his own safety ought to, make a *double return*. But this must be done upon the returning officer's own judgment, not upon the agreement of the parties. If two or more sets of electors make each a return of a different member, (which is called a *Double Election*,) that return only, which the returning officer, to whom the Sheriff's precept was directed, has signed and sealed, is good. And the members by him returned shall sit until displaced on petition. *Sim.* 184. By the *Irish* act, 35 G. 3. c. 29. the returning officer (even though not otherwise qualified to vote) must in case of an equality of votes at the poll give his casting vote, and make a return.

Where a false return, or a double return, is made, it may be amended at the bar of the House. The former either by taking the return off the file, if made by an illegal returning officer, and annexing to the writ the real return delivered by the legal officer to the clerk of the Crown. Where the Christian name of the party returned is mistaken, it may be rectified; sometimes the amendment is made by erasure of the endorsement of the wrong name, and every thing belonging to it, and by a substitution of the right name. Formerly the returning officer himself used to amend the return; but now it is usually done by the Clerk of the Crown. The double return is amended by taking one off the file. When the return is made, in order to preserve it free from dispute, the Clerk of the Crown is directed to enter it, whether a single or a double return, in a book to be kept for that purpose in his office, within six days after the return; and no amendment or alteration must be made by him or his deputy, or other, of the return, except by order of the House; and such book, or a copy thereof, is directed to be sufficient evidence of the return, in any action to be brought upon that statute; and for any default or omission in such particulars, or for certifying any person returned who was not returned, the Clerk of the Crown is liable to a penalty of 500*l.* to the party grieved, and forfeiture of his office. *Stat.* 7 & 8 W. 3. c. 7; made perpetual by *stat.* 12 Ann. st. 1. c. 15.

In double returns, it has been formerly a general practice in the House of Commons, that neither one nor the other should sit in the House until it be decided. In the year 1640, two returns were made for *Great Marlow*, and in both indentures one person was returned, and he was admitted to sit, but the others ordered to withdraw until the question was determined. And in the same year, it was ordered, that where some are returned by the Sheriff, or such other officer as by law hath power to return, and others returned by private hands; in such case, those returned by the Sheriff, or other officer, shall sit until the election is quashed by the House. *Ordinan.* 1640. If one be duly elected, and the Sheriff, &c. return another, the return must be reformed and amended; and he who is duly elected is to be inserted, for the election is the foundation, and not the return. 4 *Inst.* 49.

Double returns are to be determined before *double elections*; and the return immediately annexed to the writ must be first heard. *Sim.* 184, n.

In an action *on the case*, the plaintiff declared, that he was duly elected a member of Parliament for such a borough, and that the defendant returned two other persons; and that he petitioned the House of Commons, and was adjudged to be duly elected, and his name or-

dered to be inserted in the roll, and the name of the other to be razed out: the plaintiff had a verdict; but it was adjudged, in arrest of judgment, that this declaration was not founded on the *stat. 7 & 8 W. 3. c. 7*, because that statute gave an action where there was none before; therefore the fact must be made agreeable to it, which not being done, defendant had judgment. 2 *Salk.* 504. The Court will not meddle in an action upon a double return, until it is determined in Parliament. *Lutw.* 88. And it hath been holden, that for a double return, no action lay, before the statute *7 & 8 W. 3. c. 7*, because it is the only method the Sheriff had to secure himself; and when the right was decided in Parliament, then one indenture was taken off the file, so that it is not then a double return; neither can the party have an action for a false return, for the matter may be determined in the House whether true or false; and if so, there will be an inconvenience in contrary resolutions, if they should determine one way, and the Courts at law another; but after a dissolution the action may lie for a false return, for then the right cannot be determined in Parliament. 2 *Salk.* 502.

A double return is the same as a false return, as to action on the case; in both it is grounded on the falsity; but there is another reason why this action will not lie for a double return, *viz.* because the law doth not take notice of such a return; it is only allowed by the usage of Parliament, and in cases wherein the proper officer cannot determine who is chosen; therefore, when he doubts, he makes a double return, and submits the choice to the determination of the House of Commons, and if that House admits such returns, and make determinations on them, it will be hard for the law to subject a man to an action only for submitting a fact to be determined by a court, which hath a proper jurisdiction to determine it. 2 *Lev.* 114.

A Member elected and returned for several places, is to make his choice for which place he will serve; and if he doth not, by the time which the House shall appoint, the House may determine for what place he shall continue a member, and writs shall go out for the other place.

The proceedings on elections in *Ireland* are regulated by an *Irish* act, 35 *Geo. 3. c. 29*.

An action on the case lies, by a burgess against the returning officer of a borough, for refusing his vote at an election for members to serve in Parliament. This was decided in an action brought by one *Ashby*, a burgess of *Ailesbury*, against *White & al.* constables of the said borough, for refusing to receive the plaintiff's vote in the election of a member of Parliament; the plaintiff had a verdict, with 5*l.* damages; but the judgment was arrested by the opinion of three Judges, *viz.* that the action is not maintainable, because the constables acted as judges, and the not receiving the plaintiff's vote is *dammum sine injuria*; for when the matter comes before the House, his vote will be received; that the right of electing members to serve in Parliament is to be decided in Parliament, and the plaintiff may petition the House for that purpose; and after it is determined there, he may then bring his action and not before. *Holt*, Chief Justice *contra*; That the plaintiff had a right to vote; a freeholder has a right to vote by reason of his freehold; and it is a real right, and the value of his freehold was not material till the *stat. 8 Hen. 6.* which requires it to be 40*s. per annum*: that as it is *ratione liberi tenementi* in counties;

so, in antient boroughs, they have a right to vote *ratione burgagii*; and in cities and corporations, it is *ratione franchesiæ*, and a personal inheritance, vested in the whole corporation, but to be used by the particular members; that this is a noble privilege, which entitles the Subject to a share in the government and legislature; and that if the plaintiff hath a right, he must have a remedy to assert that right, for want of right and want of remedy is the same thing: that refusing to take the the plaintiff's vote is an injury, and every injury imports a damage; and that where a Parliamentary matter comes in, incidentally, to an action of property in the King's Court, it must be determined there, and not in Parliament; the Parliament cannot judge of the injury, nor give damages to the plaintiff, and he hath no remedy by way of petition: And, according to this opinion, the judgment of the other three judges was reversed, upon a writ of error brought in the House of Lords; who ordered that the plaintiff should recover his damages assessed by the jury. See *Bro. P. C.* and also 1 *Salk.* 19: 6 *Mod.* 45: 3 *Salk.* 17: 8 *St. Tri.* 89: *Holt* 524: *Ld. Raym.* 938: *Raym. Ent.* 479.

This determination occasioned much disturbance in both Houses of Parliament: and on the 25th of *January* 1704, the House of Commons resolved itself into a committee on the business: and, after a very long and animated debate, came to five resolutions; importing, that the Commons of *England*, in Parliament assembled, had the sole right to examine and determine all matters relating to the right of election of their own members; and that the right was not determinable elsewhere. That the practice of determining the qualifications of electors, in any Court of law, would expose all returning officers to a multiplicity of vexatious suits and insupportable expences; and subject them to different and independent jurisdictions, as well as to inconsistent determinations in the same case, without relief. That *Ashby* was guilty of a breach of privilege, as were all persons bringing actions, and all attorneys, solicitors, counsellors, and serjeants at law, soliciting, prosecuting, or pleading in any case of the same nature. These resolutions, signed by the clerk, were fixed upon the gate of *Westminster-Hall*. The Lords, on their part, passed resolutions in support of their judgment, copies of which and the case itself were sent by the Lord Keeper to all the Sheriffs of *England*; to be circulated through all the boroughs of their respective counties. See *Bro. P. C.* title *Action*. *Smollet's Hist. Eng.* l. 1. c. 8.

Several persons were, in the next session, committed to *Newgate*, under a warrant signed by *Robert Harley*, Speaker of the House of Commons, for prosecuting actions at law against the constables of the borough of *Aylesbury*, who refused to take their votes at the election of members of Parliament, &c. in contempt of the jurisdiction and privileges of the House; and this matter being returned to several writs of *habeas corpus*, and the several persons defendants brought into Court, counsel moved that they might be discharged; for that the prosecution of a suit at law could be no unlawful act, nor a breach of the privilege of the House of Commons: three Judges were of opinion, that the House were the proper judges of their own privileges; and the parties were accordingly remanded, on the ground that the Court of *K. B.* had not jurisdiction. *Holt*, Chief Justice, however held, that the authority of the Commons was circumscribed by law; and if they should exceed that authority, then to say they were judges of their own privileges, is to make their privileges to be

what they would have them to be; and that if they should wrongfully imprison, there could be no redress; so that the Courts at *Westminster* could not execute the laws upon which the liberties of the Subject subsist. 2 *Salk.* 503; 2 *Ld. Raym.* 1105. See *ante* IV. 1; V. 2.

The question, as to this right of action against a returning officer for refusing a vote, was intended to have been decided on a *writ of error*, to review the judgment of the Court of *K. B.*; but some doubt was entertained whether such writ of error lay. 3 *Salk.* 504. And the business was at length put an end to by the prorogation of Parliament; and the determination in *Ashby* and *White* has never since been disputed.

The question, as to the power of the House of Commons to commit for a contempt, was again brought before the Court of King's Bench in the Honourable *Alex. Murray's* case. 1 *Wils.* 299; and before the Court of Common Pleas in the case of *Brass Crosby*. 3 *Wils.* 188; *Black. Rep.* 754. In both which it was ruled, according to the decision in *Salkeld*, that a person committed by the House of Commons for a contempt, cannot be discharged by a Court of Common Law. See this Dictionary, title *Bail* II.

The form and manner of proceeding upon *Petitions* to the House of Commons, in cases of controverted elections, are now regulated by statute, 10 *Geo.* 3. c. 16; (made perpetual by *stat.* 14 *Geo.* 3. c. 15;) which directs the method of choosing, by lot, a select committee of fifteen members, who are sworn well and truly to try the same, and a true judgment to give according to the evidence.

This statute 10 *Geo.* 3. c. 16. is best known by the name of *Grenville's Act*; and has been much improved by *stats.* 11 *Geo.* 3. c. 42; 25 *Geo.* 3. c. 84. § 10—12; 28 *Geo.* 3. c. 52; 32 *Geo.* 3. c. 1; 36 *Geo.* 3. c. 59; 42 *Geo.* 3. c. 84. (made perpetual, 47 *Geo.* 3. st. 1. c. 1). By these statutes any person may present a petition, complaining of an undue election: but one subscriber to the petition must enter into a recognizance, himself in 200*l.* with two sureties in 100*l.* each, to appear and support his petition: and then the House shall appoint some day, beyond fourteen days after the commencement of the session, or the return of the writ, and shall give notice to the petitioners, and the sitting members, to attend the bar of the House on that day by themselves, their counsel or agents; this day, however, may be altered, but notice shall be given of the new day appointed. On the day fixed, if 100 members do not attend, the House shall adjourn from day to day; except over *Sundays*, and for any number of days over *Christmas-day*, *Whitsunday*, and *Good Friday*: and on such day the House shall not proceed to any other business, previous to reading the order of the day for taking the petition into consideration, except swearing in members; receiving reports from committees; amending a return; attending his Majesty, or a commission, in the House of Lords; receiving messages from the Lords; proceeding in the prosecution of an impeachment before that House; or proceeding upon the order of the day for the call of the House; and making other orders for enforcing the attendance of members.

By 42 *G.* 3. c. 84. (made perpetual by 47 *G.* 3. st. 1. c. 1.) successive committees may be appointed on the same day, if a competent number of members (*viz.* 120 for 2 committees, 200 for 3, 270 for

4, 360 for 5, 460 for more than 5) attend. Committees shall be attended by short-hand writers.

By 42 G. 3. c. 106. on committees for the trial of *Irish* elections, commissions may be granted into *Ireland* for the examination of witnesses there.

The names of all the members belonging to the House are then put into six boxes or glasses in equal numbers; and the clerk shall draw a name from each of the glasses in rotation, which name shall be read by the Speaker, and if the person is present, and not disqualified, it is put down: and in this manner they proceed till 49 such names are collected. But besides these 49, each party shall select, out of the whole number present, one person, who is called the *Nominee* of that party. Members who have voted at the election in question, or who are petitioners or petitioned against, cannot serve: and persons who are sixty years of age, or who have served before, are excused, if they require it; and others who can shew any material reason, may also be excused by the indulgence of the House. After 49 names are so drawn, lists of them shall be given to the respective parties; who shall withdraw, and shall alternately strike off one (the petitioners beginning) till they are reduced to 13; and these 13, with the two Nominees, constitute the select committee. If there are three parties they shall alternately strike off one, and in that case the parties do not appoint Nominees, but the 13 shall choose two others, as the Nominees. The members of the committee shall then be ordered by the House to meet within 24 hours: and they cannot adjourn for more than 24 hours, except over *Sunday*, *Christmas-day*, and *Good Friday*, without leave of the House; and no member of the Commons shall absent himself without the permission of the House. The committee shall not in any case proceed to business with fewer than 13 members, and they are dissolved if, for three successive days of sitting, their number is less than that; unless they have sate 14 days, and then they may proceed though reduced to 12, and if 25 days to 11; and they continue to sit notwithstanding a prorogation of the Parliament. All the 15 members of the committee take a solemn oath, in the House, that they will give a true judgment according to the evidence; and every question is determined by a majority. The committee may send for witnesses, and examine them upon oath, a power which the House of Commons does not possess; and if they report that the petition or defence is frivolous or vexatious, the party aggrieved shall recover costs. On the close of the whole business, the committee report their determination to the House; who order the return to the writ to be amended accordingly, if necessary, in the manner already stated; and thus the election is definitively decided. See as to the effect of the decisions of these committees, *ante* VI. B. 1. b.

VII. THE mode of making laws is much the same in both Houses. It is proper previously to premise, that for dispatch of business each House of Parliament has its Speaker. The Speaker of the House of Lords, whose office it is to preside there, and manage the formality of business, is the Lord Chancellor, or keeper of the King's great seal, or any other appointed by the King's commission: and, if none be so appointed, the House of Lords (it is said) may elect; and an instance of that nature has occurred in the *Irish* House of Lords. The Speaker of the House of Commons is chosen by the

House; but must be approved by the King. And herein the usage of the two Houses differs, that the Speaker of the House of Commons cannot give his opinion or argue any question in the House; but the Speaker of the House of Lords, if a Lord of Parliament, may.

The Commons antiently had no continual Speaker, but, after consultation, their manner of proceeding was to agree upon some person of great abilities, to deliver their resolutions. In the reign of *William Rufus*, at a great Parliament held at *Rockingham*, a certain knight came forth, and stood before the people, and spake in the name and behalf of them all; who was undoubtedly the Speaker of the House of Commons at that time. The first Speaker certainly known was *Peter de Montford*, 44 H. 3. when the Lords and Commons sat in several Houses, or at least gave their assent severally. *Lex Constitutionis* 162.

Hume is mistaken, who says that *Peter de la Mere*, chosen in the first Parliament of Ric. II. was the first Speaker of the Commons. Vol. 3. p. 3. And in the rolls of Parliament, 51 Ed. 3. No. 87. it appears, that Sir *Thomas Hungerford* chevalier, qui avoit les parolles des communes en cest parlement, addressed the King, in the name of the Commons, in that jubilee year, to pray that he would pardon several persons who had been convicted on impeachments. And there he is not mentioned as if his office was a novelty. 1 Comm. 181. in n.

Sir *Richard Walgrave*, 5 R. 2. was the first Speaker who made any formal apology for inability, as now practised: *Richard Rich*, Esq. an. 28 H. 8. was the first Speaker who is recorded to have made request for access to the King. *Thomas Moyle*, Esq. an. 34 H. 8. is said to be the first Speaker who petitioned for freedom of speech; and Sir *Thomas Cargrave*, an. 1 Edz. was the first who made the request for privilege from arrests, &c. Sir *John Bushby*, an. 17 R. 2. was the first Speaker presented to the King, in full Parliament, by the Commons. And when Sir *Arnald Savage* was Speaker, an. 2 H. 4. it was the first time that the Commons were required by the King to choose a Speaker. *Dict.* The salary of the Speaker is now settled at 1500*l.* a quarter, or 6000*l.* a year, under stat. 30 Geo. 3. c. 10; which prohibits his holding any office under the Crown during pleasure.

In each House the act of the majority binds the whole; and this majority is declared by votes openly and publicly given.

In the House of Commons the Speaker never votes (unless in committee) except when there is an equality without his casting vote, which in that case creates a majority of the House; but the Speaker of the House of Lords has no casting vote, his vote being connected with the rest of the House; and in the case of an equality the *Non contents*, or negative voices, have the same effect and operation as if they were in fact a majority. *Lords' Journ.* 25 June 1661. The House of Lords in *Ireland* observes the same rule, and in cases of equality *semper præsumitur pro negante*. *Ld. Mountm.* i. 105. Hence the order in putting the question, on appeals and writs of error, is this; "Is it your Lordships' pleasure, that this decree or judgment should be reversed?" for if the votes are equal, the judgment of the Court below is affirmed. *Ib.* ii. 81.

Here it may not be improper to observe, that there is no *casting voice* in Courts of justice; but in the superior Courts, if the Judges are equally divided, there is no decision; and the cause is continued in Court till a majority concur; which they frequently do by consent

merely for the purpose of sending the cause, by appeal, to a higher jurisdiction. At the sessions, the justices, in cases of equality, ought to respite the matter till the next session; but if they are equal one day, and the matter is duly brought before them on another day in the same sessions, and there is then an inequality, it will amount to a judgment: for all the time of the session is considered but as one day. A casting vote sometimes signifies the single vote of a person who never votes but in the case of an equality; sometimes the double vote of a person who first votes with the rest, and then, upon an equality, creates a majority by giving a second vote. A casting vote neither exists in corporations nor elsewhere, unless it is expressly given by statute or charter; or what is equivalent, exists by immemorial usage. 1 *Comm.* 181, in n.

With respect to other formalities in the two Houses it may be observed, there are no places of precedency in the House of Commons as there are in the House of Lords; only the Speaker has a chair or seat fixed towards the upper end, in the middle of the house; and the clerk, with his assistant, sits near him at the table, just below the chair. The members of the House of Commons never had any robes, as the Lords ever had, except the Speaker and clerks, who in the House wear gowns, as professors of the law do during term time. No knight, citizen, or burgess of the House of Commons, shall depart from the Parliament without leave of the Speaker and Commons assembled; and the same is to be entered in the book of the Clerk of the Parliament. *Stat. 6 H. 8. c. 16.* And in the 1st & 2d of P. & M. informations were preferred by the Attorney General against thirty-nine of the House of Commons, for departing without licence, whereof six submitted to fines; but it is uncertain whether any of them were paid.

Calling the House is to discover what members are absent, without leave of the House, or just cause; in which cases fines have been often imposed: On the calling over, such of the members as are present, are marked; and the defaulters being called over again the same day, or the day after, and not appearing, are summoned, or sent for by the serjeant at arms. *Lex Constitutionis* 159.

Forty members are requisite to make a House of Commons for dispatch of business; and the business of the House is to be kept secret among themselves. In the 23d year of Queen Elizabeth, Arthur Hall, Esq. member of Parliament, for publishing the conferences of the House, and writing a book which contained matters of reproach against some particular members, derogatory to the general authority, power, and state of the House, and prejudicial to the validity of the proceedings, was adjudged by the Commons to be committed to the Tower for six months, fined 500*l.* and expelled the House. But the Speaker of the House of Commons, according to the duty of his office, as a servant to the House, may publish such proceedings as he shall be ordered, by the Commons assembled; and he cannot be liable for what he does that way by the command of others, unless those other persons are liable.

All bills, motions, and petitions, are by order of Parliament to be entered on the Parliament rolls, although they are denied, and never proceed to the establishment of a statute, together with the answers. *Lex Constitutionis* 154.

The Speaker of the House of Commons is not allowed to persuade or dissuade in passing a bill, only to make a short narrative of it; opening the parts of the bill, so that all may understand it; if any question be upon the bill, he is to explain, but not enter into argument or dispute. When Mr. Speaker desires to speak, he ought to be heard without interruption; and when the Speaker stands up, the member standing up is to sit down: if two stand up to speak to a bill, he who would speak against the bill, if it be known, is to be first heard; otherwise he who was first up, which is to be determined by the Speaker; no member is to be taken down, unless by Mr. Speaker, in such cases as the House do not think fit to admit; and if any person speak impertinently, or besides the question, the Speaker is to interrupt him, and know the pleasure of the House whether he shall be further heard; but if he speaks not to the matter, it may be moderated: and whosoever hisses or disturbs any person in his speech, shall answer it at the bar of the House.

In enacting laws, and other proceedings in *Parliament*, the Lords give their voices in their House, from the puisne Lord *seriatim*, by the word *Content*, or *Not Content*: the manner of voting in the House of Commons, is by *Yea* and *No*; and if it be difficult to tell which are the greater number, the House divides, and four tellers are appointed by the Speaker, two of each side, to number them, the Ayes going out, and the Noes staying in; and thereof report is made to the House. When the members of the House go forth, none is to stir, until Mr. Speaker rises from his seat, and then all the rest are to follow after.

To bring a bill into the House, if the relief sought by it is of a private nature, it is first necessary to prefer a petition; which must be presented by a member, and usually sets forth the grievance desired to be remedied. This petition (when founded on facts that may be in their nature disputed) is referred to a committee of members, who examine the matter alleged, and accordingly report it to the House; and then (or otherwise, upon the mere petition) leave is given to bring in the bill. In public matters the bill is brought in upon motion made to the House, without any petition at all. Formerly, all bills were drawn in the form of petitions, which were entered upon the Parliament rolls, with the King's answer thereunto subjoined; not in any settled form of words, but as the circumstances of the case required: and at the end of each Parliament the judges drew them into the form of a statute, which was entered on the statute rolls. (See, among numberless other instances, the *articuli cleri*, 9 *Edw.* 2.) In the reign of *Henry V.* to prevent mistakes and abuses, the statutes were drawn up by the Judges before the end of the Parliament; and in the reign of *Henry VI.* bills in the form of acts, according to the modern custom, were first introduced.

It appears that, prior to the reign of *Henry V.* it had been the practice of the Kings to add and enact more than the commons petitioned for. In consequence of this, there is a very memorable petition from the Commons *an.* 2 *Hen.* 5. which states, that it is the liberty and freedom of the Commons, that there should be no statute without their assent, considering that they have ever been *assenters*, as well as *petitioners*; and therefore they pray that for the future there may be no additions to, or diminutions from, their petitions. And in answer to this the King granted, that from thenceforth they

should be bound in no instance without their assent; saving his royal prerogative to grant and deny what he pleases of their petitions. *Ruff. Pref. xv. Rot. Parl. 2 Hen. 5. No. 22.*

Any member may move for a bill to be brought in, except it be for imposing a tax, which is to be done by order of the House; and leave being granted, the person making the motion, and those who second it, are ordered to prepare and bring in the same.

Public bills or acts of Parliaments are commonly drawn, such as relate to Taxes, or other matters of Government, by the several Public Boards, according to their respective jurisdictions; others by such members of the House of Commons as are most inclined to effect the good of the public, particularly in relation to the bill designed, taking advice thereupon; and acts for the revival, repeal, or continuance of statutes, are penned by lawyers, members of the House, appointed for that purpose.

The persons directed to bring in the bill, present it in a competent time to the House, drawn out on paper, with a multitude of blanks, or void spaces, where any thing occurs that is dubious, or necessary to be settled by the Parliament itself; (such, especially, as the precise date of times, the nature and quantity of penalties, or of any sums of money to be raised:) being indeed only the skeleton of the bill. In the House of Lords, if the bill begins there, it is (when of a private nature) referred to two of the Judges; to examine and report the state of the facts alleged, to see that all necessary parties consent, and to settle all points of technical propriety. This is read a first time, and at a convenient distance a second time; and after each reading the Speaker opens to the House the substance of the bill, and puts the question whether it shall proceed any farther. The introducing of the bill may be originally opposed, as the bill itself may at either of the readings; and if the opposition succeeds, the bill must be dropped for that session; as it must also, if opposed with success in any of the subsequent stages.

After the second reading, it is committed, that is, referred to a committee; which is either selected by the House in matters of small importance, or else upon a bill of consequence, the House resolves itself into a committee of the whole House. A committee of the whole House is composed of every member; and to form it, the Speaker quits the chair, (another member being appointed chairman,) and may sit and debate as a private member. In these committees the bill is debated clause by clause, amendments made, the blanks filled up, and sometimes the bill entirely new modelled. After it has gone through the committee, the chairman reports it to the House with such amendments as the Committee have made; and then the House reconsiders the whole bill again, and the question is repeatedly put, upon every clause and amendment. When the House hath agreed or disagreed to the amendments of the committee, and sometimes added new amendments of its own, the bill is then ordered to be engrossed, or written in a strong gross hand, on one or more long rolls (or presses) of parchment, sewed together. When this is finished, it is read a third time, and amendments are sometimes then made to it; and if a new clause be added, it is done by tacking a separate piece of parchment on the bill, which is called a Rider. *Nov. 84.* The Speaker then again opens the contents: and holding it up in his hands, puts the question, whether the bill shall pass. If this is

agreed to, the title to it is then settled; which used in antient times to be a general one for all the acts passed in the session: distinct titles for each chapter were not, it seems probable, introduced with much regularity before the time of *Henry VII.* After this, one of the members is directed to carry the bill to the Lords, and desire their concurrence; who, attended by several more, carries it to the bar of the House of Peers, and there delivers it to their Speaker, who comes down from his woolsack to receive it.

It there passes through the same forms as in the other House; (except engrossing, which is already done;) and, if rejected, no more notice is taken, but it passes *sub silentio*, to prevent unbecoming alterations. But if it is agreed to, the Lords send a message by two Masters in Chancery, (or upon matters of high dignity or importance, by two of the Judges,) that they have agreed to the same: and the bill remains with the Lords, if they have made no amendment to it. But if any amendments are made, such amendments are sent down with the bill to receive the concurrence of the Commons. If the Commons disagree to the amendments, a conference usually follows between members deputed from each House; these meet in the *painted chamber*, and debate the matter, and for the most part settle and adjust the difference; but, if both Houses remain inflexible, the bill is dropped. If the Commons agree to the amendments, the bill is sent back to the Lords by one of the members, with a message to acquaint them therewith. The same forms are observed, *mutatis mutandis*, when the bill begins in the House of Lords. But when an act of grace or pardon is passed, it is first signed by his Majesty, and then read once only in each of the Houses, without any new engrossing or amendment. *D'Ewe's Journ.* 20; 73: *Com. Journ.* 17 June 1747. And when both Houses have done with any bill, it is always deposited in the House of Peers to wait the royal assent; except in the case of a bill of Supply, which after receiving the concurrence of the Lords is sent back to the House of Commons. *Com. Journ.* 24 July 1660.

If any debate happens on the first reading of a bill, the Speaker puts the question whether the same shall have a second reading; and sometimes upon motion appoints a day for it; for public bills, unless upon extraordinary occasions, are seldom read more than once a day, the members being allowed convenient time to consider of them: if nothing be said against a bill, the ordinary course is to proceed without a question; but if the bill be generally disliked, a question is sometimes put, whether the bill shall be rejected? If it be rejected, it cannot be proposed any more that sessions: when a bill hath been read a second time, any member may move to have the same amended; but no member of the House is admitted to speak more than once in a debate, except the bill be read more than once that day, or the whole House is turned into a committee; and after some time spent in debates, the Speaker, collecting the sense of the House, reduces the same to a question, which he submits to the House, and is put to the vote; and a question is to be put, after the bill is so read a second time, whether it shall be committed? The Chairman of the committee makes his report of a bill at the side bar of the House, reading all the alterations made, and then delivers the same to the clerk of the Parliament; who likewise reads all the amendments, and the Speaker puts the question, whether they shall be read a second

time? And if that be agreed unto, he reads the amendments himself, and puts the question, whether the bill so amended shall be engrossed, and read a third time, some other day? In the House of Lords, if a bill be not committed, then it is to be read a third time, and the next question to be for its passing; and on the third reading of the bill, any member may speak against the whole bill to throw out the same, or for amendment of any clause. *Pract. Solic. in Par.* 397, 398.

In cases of private bills, when the petition is read, and leave given to bring in the bill, the persons concerned and affected by it may be heard by themselves or counsel at the bar, or before the committee, to whom such bill is referred; and in case of a Peer, he shall be admitted to come within the bar of the House of Commons, and sit covered on a stool whilst the same is debating. And after counsel are heard on both sides, and the House is satisfied with the contents of the bill, it goes through the several forms.

The *Royal Assent* may be given two ways: 1. In person; when the King comes to the House of Peers, in his crown and royal robes, and sending for the Commons to the bar, the titles of all the bills that have passed both Houses are read; and the King's answer is declared by the clerk of the Parliament in *Norman-French*: a badge, it must be owned, (now the only one remaining,) of conquest; and which one could wish to see fall into total oblivion, unless it be reserved as a solemn memento to remind us that our liberties are mortal, having once been destroyed by a foreign force. If the King consents to a public bill, the clerk usually declares, "*Le Roy le veut*—The King wills it so to be:" if to a private bill, "*Soit fait comme il est désiré*; Be it as it is desired." If the king refuses his assent, it is in the gentle language of "*Le Roy s'avisera*; The King will advise upon it." When a bill of Supply is passed, it is carried up and presented to the King, by the Speaker of the House of Commons; and the royal assent is thus expressed, "*Le Roy remercie ses loyal subjects, accepte leur benevolence, et aussi le veut*; The King thanks his loyal Subjects, accepts their benevolence, and wills it so to be." *Rot. Parl.* 9 *Hen. 4. in Pryn.*: 4 *Inst.* 30, 31. In case of an act of grace, which originally proceeds from the Crown, and has the royal assent in the first stage of it, the Clerk of the Parliament thus pronounces the gratitude of the Subject; "*Les prelates, seigneurs, et commons, en ce present parliament assemblés, au nom de tous vous autres subjects, remercient tres humblement votre Majesté, et prient a Dieu vous donner en santé bonne vie et longue*; The Prelates, Lords, and Commons, in this present Parliament assembled, in the name of all your other Subjects, most humbly thank your Majesty, and pray to God to grant you in health and wealth long to live." *D'Ewes's Journ.* 31.

The words *Le Roy s'avisera* correspond to the phrase formerly used by Courts of justice, when they required time to consider of their judgment; *viz. Curia advisare vult*. And there can be little doubt but, originally, these words implied a serious intent in the King to take the subject under consideration; and they only became in effect a negative, when the bill or petition was annulled by a dissolution, before the King communicated the result of his deliberation: for in the Rolls of Parliament, the King sometimes answers, that the petition is unreasonable, and cannot be granted; sometimes

he answers, that he and his Council will consider of it; as in *Rot. Parl.* 37 E. 3. No. 33.

This prerogative of rejecting bills was exercised to such an extent, in ancient times, that *D'Erves* informs us, that Queen *Elizabeth* at the close of one session gave her assent to twenty-four public, and nineteen private bills; and at the same time rejected forty-eight, which had passed the two Houses of Parliament. *Journ.* 596. The last time it was exerted was in the year 1692, by King *William III.* who at first refused his assent to the bill for triennial Parliaments; but was prevailed upon to permit it to be enacted, two years afterwards. *De Lolme* 404.

By § 3, 4. of 33 H. 8. c. 21. which was passed to attain Queen *Katherine* of treason, it was enacted that the King's assent by letters patent under his great seal, signed with his hand, and notified in his absence to both Houses assembled together in the Lords' House, ever was and should be of like force, as if given by the King in person.

When the bill has received the royal assent in either of these ways, it is then, and not before, a statute or act of Parliament, and is placed among the records of the kingdom; there needing no formal promulgation to give it the force of a law, as was necessary by the civil law with regard to the Emperor's edicts: because every man in *England* is, in judgment of law, party to the making of an act of Parliament, being present thereat by his representatives. However, a copy thereof is usually printed at the King's press for the information of the whole land. And formerly, before the invention of printing, it was used to be published by the Sheriff of every county; the King's writ being sent to him at the end of every session, together with a transcript of all the acts made at that session; commanding him, "*ut statuta illa, et omnes articulos in eisdem contentos, in singulis locis ubi expedire viderit, publicè proclamari, et firmiter teneri et observari faciat.*" And the usage was to proclaim them at his County-Court, and there to keep them, that whoever would might read or take copies thereof; which custom continued till the reign of *Henry VII.* 3 *Inst.* 41: 4 *Inst.* 26. See further, title *Statute*.

An act of Parliament, thus made, is the exercise of the highest authority that this kingdom acknowledges upon earth. It hath power to bind every Subject in the land, and the dominions thereunto belonging; nay, even the King himself, if particularly named therein. And it cannot be altered, amended, dispensed with, suspended, or repealed, but in the same forms and by the same authority of Parliament: for it is a maxim in law, that it requires the same strength to dissolve, as to create an obligation. It is true it was formerly held, that the King might in many cases dispense with penal statutes. *Finch. L.* 81, 234: *Bacon. Elem. c.* 19. But now, by *stat. 1 W. & M. st. 2. c. 2.* it is declared that the suspending or dispensing with laws by regal authority, without consent of Parliament, is illegal; as has already been repeatedly noticed. See this Dictionary, title *King*.

VIII. An Adjournment is no more than a continuance of the session from one day to another, as the word itself signifies; and this is done by the authority of each House separately every day; and sometimes for a fortnight or month together, as at *Christmas* or *Easter*, or upon other particular occasions. But the adjournment of one House is no adjournment of the other. 4 *Inst.* 28. It hath also been usual,

when his Majesty hath signified his pleasure that both or either of the Houses should adjourn themselves to a certain day, to obey the King's pleasure so signified, and to adjourn accordingly. *Com. Journ. Passim*. Otherwise, besides the indecorum of a refusal, a prorogation would assuredly follow; which would often be very inconvenient to both public and private business. For prorogation puts an end to the session: and then such bills as are only begun and not perfected must be resumed *de novo* (if at all) in a subsequent session, whereas, after an adjournment, all things continue in the same state as at the time of the adjournment made, and may be proceeded on without any fresh commencement.

A Prorogation is the continuance of the Parliament from one session to another, as an adjournment is a continuation of the session from day to day. This is done by the royal authority, expressed either by the Lord Chancellor in his Majesty's presence, or by commission from the Crown, or frequently by proclamation.

At the beginning of a new Parliament, when it is not intended that the Parliament should meet, at the return of the writ of summons, for dispatch of business, the practice is to prorogue it, by a writ of prorogation; as the Parliament called in 1790 was prorogued twice by writ; and the first Parliament in the reign of *Geo. III.* was prorogued by four writs. On the day upon which the writ of summons is returnable, the members of the House of Commons who attend, do not enter their own House, or wait for a message from the Lords, but go immediately up to the House of Lords where the Chancellor reads the writ of prorogation, and when it is intended that they should meet upon the day to which the Parliament is prorogued for dispatch of business, notice is given by a proclamation. 1 *Comm. c. 2. ft. 187. in n.* See *post*.

Both Houses are necessarily prorogued at the same time, it not being a prorogation of the House of Lords, or Commons, but of the Parliament. The session is never understood to be at an end until a prorogation: though, unless some act be passed or some judgment given in Parliament, it is in truth no session at all. 4 *Inst. 28: Hale of Parl. 38: Hut. 61.* And formerly the usage was, for the King to give the royal assent to all such bills as he approved, at the end of every session, and then to prorogue the Parliament; though sometimes only for a day or two: after which all business then depending in the Houses was to be begun again. Which custom obtained so strongly, that it once became a question, whether giving the royal assent to a single bill did not, of course, put an end to the session. And, though it was then resolved in the negative, yet the notion was so deeply rooted, that the *stat. 1 Car. 1. c. 7.* was passed to declare, that the King's assent to that and some other acts should not put an end to the session; and even so late as the reign of *Charles II.* we find a proviso frequently tacked to a bill, that his Majesty's assent thereto should not determine the session of Parliament. *Stat. 12 Car. 2. c. 1: 22 & 23 Car. 2. c. 1.* But it now seems to be allowed, that a prorogation must be expressly made, in order to determine the session.

All orders of Parliament determine by prorogation: and one taken by order of the Parliament, after their prorogation, may be discharged on an *habeas corpus*, as well as after a dissolution; but it was long since determined, that the dissolution of a Parliament did not alter the state of impeachments, brought up by the Commons in a preced-

ing Parliament. *Raym.* 120: 1 *Lev.* 384. See title *Impeachment*. Cases of appeals and writs of error shall continue, and are to be proceeded on, *in statu quo*, &c. as they stood at the dissolution of the last Parliament. *Raym.* 381.

A prorogation of Parliament is always by the King, and in this case the sessions must begin *de novo*. An adjournment is by each House, and the sessions continues notwithstanding such adjournment. 1 *Mod.* 242. By a prorogation of Parliament, there is a session; and every several session of Parliament is in law a several Parliament: though if it be only an adjournment, there is no session; and when a Parliament is called and doth sit, but is dissolved without any act passed, or judgment given, it is no Session of Parliament, but a Convention. 4 *Inst.* 27. If a Parliament is assembled, and orders made, and writs of error brought in the House of Peers, and several bills agreed on, but none signed; this is but a Convention, and no Parliament, or Session of Parliament: but every session, in which the King signs a bill, is a Parliament, and so every Parliament is a session. 1 *Rol. Ref.* 29: *Hut.* 61.

The Parliament from the first day of sitting is called the first Session of Parliament, &c. *Raym.* 120. And the Courts of justice *ex officio* are to take notice of the beginning, prorogation, and ending of every Parliament; also of all general statutes. 1 *Lev.* 296: *Hob.* 111.

On prorogation, such bills as have passed, not having received the royal assent, must fall; for there can be no act of Parliament, without consent of the Lords and Commons, and the royal *fiat* of the King, giving his consent personally, or by commission. Special acts have occasionally been passed to prevent the effect of prorogation of Parliament, in cases of Impeachment, &c. See 45 *G. 3. c.* 117 & 125.

It was held generally, that the King could not summon a Parliament before the day to which it was last prorogued; and that when a Parliament was prorogued to a certain day, they did not meet on that day, unless it were particularly declared, by the proclamation giving notice of the prorogation, that they should meet *for the dispatch of business*, and when it had not been prorogued by such a proclamation, and it was intended that Parliament should actually sit, it was the established practice to issue a proclamation, to give notice that it was for the dispatch of business; and this proclamation, unless upon some urgent occasion, bore date at least forty days before the meeting. 2 *Hats.* 239. Provisions for the meeting of Parliament within fourteen days have been from time to time made by the several Militia acts. By the existing acts, 42 *G. 3. c.* 90. for *England*; *c.* 91. for *Scotland*; in all cases of actual invasion, or imminent danger of it, and in cases of rebellion or insurrection, the King having first communicated the occasion to Parliament, if sitting, and if no Parliament be sitting, having notified the occasion by proclamation, may order the militia to be called out and embodied. And wherever this is done, if the Parliament be adjourned or prorogued, he shall convene them within fourteen days. See 42 *G. 3. c.* 90. § 111—113. 146, 147. and *c.* 91. § 109. 142.

By 37 *G. 3. c.* 127. a permanent provision was introduced, That whenever the King shall be pleased, by advice of the Privy Council, to issue a proclamation that Parliament shall meet and be holden for dispatch of business, on any day not less than fourteen days from the date of such proclamation, the same shall be sufficient notice to all persons, and the Parliament shall stand prorogued to the day and

place therein declared, notwithstanding any former prorogation, or any law or usage to the contrary. And by 39 & 40 G. 3. c. 14. this provision is extended to the case of an adjournment of Parliament, as well as a prorogation.

A Dissolution is the civil death of the Parliament; and this may be effected three ways; *First*, By the King's will, expressed either in person or by representation. For, as the King has the sole right of convening the Parliament, so also it is a branch of the royal Prerogative, that he may (whenever he pleases) prorogue the Parliament for a time, or put a final period to its existence. If nothing had a right to prorogue or dissolve a Parliament but itself, it might happen to become perpetual. And this would be extremely dangerous, if at any time it should attempt to incroach upon the Executive Power: as was fatally experienced by the unfortunate King *Charles* the First; who having unadvisedly passed an act to continue the Parliament then in being, till such time as it should please to dissolve itself, at last fell a sacrifice to that inordinate power, which he himself had consented to give them. It is therefore extremely necessary that the Crown should be empowered to regulate the duration of these assemblies, under the limitations which the *English* constitution has prescribed: so that, on the one hand, they may frequently and regularly come together, for the dispatch of business and redress of grievances; and may not, on the other, even with the consent of the Crown, be continued to an inconvenient or unconstitutional length.

A Parliament, it hath been said, ought not to be dissolved as long as any bill remains undiscussed; and proclamation must be made in the Parliament, that if any person have any petition, he shall come in and be heard, and if no answer be given, it is intended the Public are satisfied.

Secondly, A Parliament may be dissolved by the demise of the Crown. This dissolution formerly happened immediately upon the death of the reigning sovereign: for he being considered in law as the head of the Parliament, that failing, the whole body was held to be extinct. But the calling a new Parliament immediately on the inauguration of the successor being found inconvenient, and dangers being apprehended from having no Parliament in being, in case of a disputed succession, it was enacted by *stat. 7 & 8 W. 3. c. 15.* that the Parliament in being should, if sitting, continue for six months after the demise of the Crown, unless sooner dissolved, &c. by the Successor: and if not sitting, should meet on the day of prorogation; and that in case no Parliament was in being, the last preceding Parliament should convene and sit. By *stat. 6 Ann. c. 7. § 4.* it is more explicitly enacted, that Parliament shall not be determined or dissolved by demise of the Crown; but shall continue, and if sitting at the time of such demise, immediately proceed to act for six months and no longer, unless sooner prorogued or dissolved by the Successor: and if prorogued, shall meet on the day of the prorogation, and sit for the remainder of the said six months, unless sooner dissolved, &c. By § 5. it is provided, that if there be a Parliament in being at the time of the demise of the Crown, but the same happens to be then separated by adjournment or prorogation, such Parliament shall immediately after such demise meet, convene, and sit, and shall act, notwithstanding such demise, for six months, unless sooner dissolved, &c. By § 6. (repealed by 37 G. 3. c. 127.) it was provided, that in case at the time of

such demise there were no Parliament in being that had met and sate, the last preceding Parliament should immediately convene. The said act, 37 G. 3. c. 127. enacts, (§ 3.) that in case of the demise of the Crown, subsequent to the dissolution or expiration of a Parliament, and before the day appointed by the writs of summons for assembling a new Parliament, in such case the last preceding Parliament shall immediately convene and sit at *Westminster*, and be a Parliament for six months, and no longer, as if the said Parliament had not been dissolved or expired: subject to be dissolved or prorogued by the Successor. By § 4. this proviso is extended to the case of the demise of a Successor to the Crown, within six months after his succession, without his having dissolved the Parliament, or after it shall have been dissolved, and before a new one shall have met. By § 5. it is enacted, that in case of the demise of the Crown, on or after the day appointed by the writs of summons, for assembling a new Parliament, and before such new Parliament shall have actually met, such new Parliament shall immediately after such demise convene and sit at *Westminster*, and be a Parliament for six months, and no longer, subject to be dissolved, &c.

Lastly, a Parliament may be dissolved or expire by length of time. For if either the Legislative Body were perpetual; or might last for the life of the Prince who convened them, as formerly; and were so to be supplied, by occasionally filling the vacancies with new representatives; in these cases, if it were once corrupted, the evil would be past all remedy; but when different bodies succeed each other, if the people see cause to disapprove of the present, they may rectify its faults in the next. A Legislative Assembly also, which is sure to be separated again, (whereby its members will themselves become private men, and subject to the full extent of the laws which they have enacted for others,) will think themselves bound, in interest as well as duty, to make only such laws as are good. The utmost extent of time that the same Parliament was allowed to sit, by *stat. 6 W. & M. c. 2.* was three years; after the expiration of which, reckoning from the return of the first summons, the Parliament was to have no longer continuance. But by *stat. 1 Geo. 1. st. 2. c. 38.* (in order, professedly, to prevent the great and continued expenses of frequent elections, and the violent heats and animosities consequent thereupon, and for the peace and security of the government then just recovering from the late rebellion,) this term was prolonged to seven years: and, what alone is an instance of the vast authority of Parliament, the very same *House*, that was chosen for three years, enacted its own continuance for seven. So that, as our Constitution now stands, the Parliament must expire, or die a natural death, at the end of every seventh year, if not sooner dissolved by the royal prerogative, as it generally is, in the course of every five or six years.

This Septennial Act has been termed an unconstitutional exertion of the authority of Parliament; and the reason alleged is, that those who had a power delegated to them for three years only, could have no right to extend that term to seven years. But this, says Mr. *Christian*, appears to be a fallacious mode of considering the subject. Before the Triennial Act, 6 W. & M. c. 2. the duration of Parliament was only limited by the pleasure or death of the King; and it never can be supposed that the next, or any succeeding, Parliament had not the power of repealing the Triennial Act; and if that had

been done, then as before, they might have sat 17 or 70 years. It is certainly true, that the simple repeal of a former statute would have extended their continuance much beyond what was done by the Septennial Act. 1 *Comm. c. 2. ad fin. in n.* To this may be added an observation, which seems unaccountably to have been passed over in silence by the defenders (and therefore no wonder by the accusers) of the Septennial Act; namely, that it is not true in fact, as the argument is usually put, that a Parliament chosen for three years continued themselves for seven, since it was only one part of the Parliament, the *House of Commons*, which was chosen for any limited time; and the Septennial Act was the act of the *whole Legislature*.

PARLIAMENTUM DIABOLICUM, A Parliament held at *Coventry*, 38 *H. 6.* wherein *Edward Earl of March*, (afterwards *King Edw. IV.*) and many of the chief nobility were attainted, was so called; but the acts then made were annulled by the succeeding Parliament. *Holingshed's Chron.*

PARLIAMENTUM INDOCTORUM, the *Lack-learning Parliament*, A Parliament held 6 *H. 4.* whereunto by special precept to the Sheriffs in their several counties, no lawyer, or person skilled in the law, was to come. See title *Parliament VI. 2.*

PARLIAMENTUM INSANUM, A Parliament assembled at *Oxford*, anno 41 *H. 3.* so styled, from the madness of their proceedings; and because the Lords came with armed men to it, and contentions grew very high between the King, Lords, and Commons, whereby many extraordinary things were done. 4 *Inst.*

PARLIAMENTUM RELIGIOSORUM. In most convents, they had a common room into which the brethren withdrew for conversation; and the conference there had was termed *Parliamentum*. *Mat. Paris.* The abbot of *Croyland* used to call a Parliament of his monks, to consult about the affairs of his monastery: and at this day, the Societies of the two Temples, or Inns of Court, call that assembly of the Benchers or Governors, a Parliament; wherein they confer upon the common affairs of their several Houses. *Crompt. Juried. 1.*

PAROL, Word of Mouth; See titles *Agreement; Fraud; Assumpsit; Will; Trust.*

As to what things may be done by Parol without deed, the following determinations may deserve notice.

An use will not pass by Parol without deed; but *Ch. J. Pemberton* said, it would be a good trust or Chancery use, if for money. 2 *Show. 156.* A Parol release is good to discharge a debt by simple contract. *Arg. 2 Show. 417.*

A promise merely executory on both parts; as if I promise *B. 5s.* if he goes to *Paul's*, before *E.* goes, I may discharge him, and so shall discharge myself of payment of the *5s.* for no debt was yet due, nor any thing executed on either side. 3 *Lev. 238.* An agreement in writing, since the statute of frauds and perjuries, may be discharged by Parol. *Vern. 240.* A rent assigned in lieu of dower may be by Parol without deed, though it be a freehold created *de novo*: and though a rent lies in grant; because this is not properly a grant, but an appointment. 12 *Mod. 201.* Lessee for years surrendered to the lessor by Parol reserving rent; adjudged this was a good reservation upon the contract, and that an action of debt would lie for the rent af-

ter the first day of payment incurred, though the reservation was by way of contract, and without any deed. 3 *Salk.* 312. *pl.* 7.

If one has a bill of exchange, he may authorise another to indorse his name upon it, by Parol; and when that is done, it is all one as if he had done it himself. 12 *Mod.* 564. See title *Bill of Exchange*.

An insurance was made from *Archangel* to the *Downs*, and from the *Downs* to *Leghorn*, but there was a Parol agreement at the same time, that the policy should not commence till the ship came to such a place, and it was held, that the Parol agreement should avoid (or defeat) the writing; cited *per Holt Ch. J.* as adjudged in *Pemberton's* time. 2 *Salk.* 444, 445. See title *Insurance*.

If a thing is granted by a writing, which is grantable by Parol, it may be revoked by Parol. 10 *Mod.* 74.

Deputation of an office is in its own nature grantable by Parol; and therefore though it should happen to be granted by writing, yet since it is in itself grantable by Parol, it may be revoked by Parol. 10 *Mod.* 74.

PAROLS, or Pleadings, are the mutual altercations between the plaintiff and defendant; which at present are sat down and delivered into the proper office in writing, though formerly they were usually put in by their counsel *ore tenus*, or *viva voce*, in Court, and then minuted down by the chief clerks, or prothonotaries; whence in our old law *French* the pleadings are frequently denominated the Parol. 3 *Comm.* 293. See title *Pleadings*.

Parol is sometimes joined with lease, as lease Parol, *i. e.* lease *per* Parol, a lease by word of mouth, to distinguish it from a lease in writing. *Cowell*.

PAROL ARREST, Any Justice of Peace may, by word of mouth, authorize any one to arrest another who is guilty of a breach of the peace in his presence, &c. *Dalt.* 117. See title *Arrest*.

PAROL DEMURRER, Is a privilege allowed an infant, who is sued concerning lands which came to him by descent; and the Court thereupon will give judgment *quod loquela predicta remaneat, quosque* the infant comes to the age of twenty-one years. And where the age is granted on Parol Demurrer, (which may happen on the suggestion of either party, 3 *Comm.* 300.) the writ doth not abate, but the plea is put *sine die*, until the infant is of full age; and then there shall be a re-summons. 2 *Lill. Abr.* 283: 2 *Inst.* 258: *Rast. Entr.* 363.

In Parol Demurrer, when it may be had, if two are vouched, and there is Parol Demurrer for the nonage of the one; it shall be for the other also. 45 *Ed.* 3. 23. But by the statutes *Westm.* 1; 3 *Ed.* 1. c. 46. and of *Gloucester*, 6 *Ed.* 1. c. 2. in writs of entry *sur disseisin* in some particular cases, and in actions ancestrel brought by an infant, the Parol shall not demur; otherwise he might be deforced of his whole property, and even want a maintenance till he came of age. 6 *Rep.* 3, 5. So likewise in a writ of dower the heir shall not have his age; for it is necessary that the widow's claim be immediately determined, else she may want a present subsistence. 1 *Roll. Abr.* 137. Nor shall an infant patron have it in a *quare impedit*, since the law holds it necessary and expedient, that the church be immediately filled. 1 *Roll. Abr.* 138.

PAROL EVIDENCE; See *Evidence II.*

PARRICIDE, *Patricida*.] He who kills his father or mother. *Larv. Lat. Dict.* It is also used for the *crime* of killing.

By the *Roman* law, Parricide, or the murder of one's parents or children, was punished in a much severer manner than any other kind of homicide. After being scourged, the delinquents were sewed up in a leather sack, with a live dog, a cock, a viper, and an ape, and so cast into the sea. *Solon*, it is true, in his laws, made none against Parricide; apprehending it impossible that any one should be guilty of so unnatural a barbarity. And the *Persians*, according to *Herodotus*, entertained the same notion, when they adjudged all persons who killed their reputed parents to be bastards. And, upon some such reason as this, must we account for the omission of an exemplary punishment for this crime in our *English* laws; which treat it no otherwise than as simple murder; unless the child was also the servant of his parent. 1 *Hal. P. C.* 380.

For though the breach of natural relation is unobserved, yet the breach of civil or ecclesiastical connections, when coupled with murder, denominates it a new offence; no less than a species of treason, called *parva proditio*, or petit treason; which, however, is nothing else but an aggravated degree of murder; although, on account of the violation of private allegiance, it is stigmatized as an inferior species of treason. And thus, in the antient *Gothic* constitution, we find the breach both of natural and civil relations, ranked in the same class with crimes against the State and Sovereign. 4 *Comm.* 202, 3. See title *Treason*.

PARSON.

PERSONA ECCLESIAE.] One that hath full possession of all the rights of a parochial church. He is called Parson, *Persona*, because, by his person the Church, which is an invisible body, is represented; and he is in himself a body corporate, in order to protect and defend the rights of the Church (which he personates) by a perpetual succession. 1 *Inst.* 300. It has been also said, that he is called *Parson*, as he is bound, by virtue of his office, *in propria personâ servire Deum*. *Fleta*, l. 9. c. 18. He is sometimes called the *Rector* or Governor of the Church; but the appellation of *Parson* is the most legal, as well as the most beneficial and honourable, title that a parish priest can enjoy; because such an one, (as *Coke* observes,) and he only, is said *vicem seu personam ecclesiae gerere*. 1 *Comm.* c. 11. f. 384.

The word *Parson*, in a large sense, includes all clergymen having spiritual presentments. And there may be two Parsons in one church; one of the one moiety, and the other of the other; and a part of the church and town allotted to each: and there may be two, that make but one Parson in a church, presented by one patron. 1 *Inst.* 17, 18.

A Parson hath the entire fee of his church; and where it is said he hath not the right of fee-simple, that is understood as to bringing a temporal writ of right. *Cro. Car.* 582. And in the time of the Parson, the patron hath nothing to do with the church; but if the Parson wastes the inheritance thereof to his own private use, in cutting trees, &c. his patron may have a prohibition, so that, to some purposes, he hath an interest during the Parson's time. 11 *H.* 6. 4: 11 *Rep.* 49.

- I. *The Distinction between a Parson (or Rector); and a Vicar.*
- II. *The Method of becoming a Parson or Vicar; and of their Qualifications and Duties.*
- III. *How one may cease to be a Parson or Vicar.*

I. THOUGH a Parson has regularly during his life the freehold in himself of the parsonage house, the glebe, the tithes, and other dues: yet these are sometimes *appropriated*; that is to say, the benefice is perpetually annexed to some spiritual corporation, either sole or aggregate, being the patron of the living; which the law esteems equally capable of providing for the service of the church, as any single private clergyman. See this Dictionary, title *Appropriation*.

The antient appropriating Corporations, or Religious Houses, were wont to depute one of their own body to perform divine service, and administer the sacraments in those parishes, of which the Society thus became the Parson. This officiating minister was in reality no more than a curate, deputy, or vicegerent of the appropriator, and therefore called *Vicarius* or Vicar. His stipend was at the discretion of the Appropriator; who was however bound of common right to find somebody, *qui illi de temporalibus, episcopo de spiritualibus, debeat respondere*. *Seld. Tith. c. 11. 1.* But this was done in so scandalous a manner, and the parishes suffered so much by the neglect of the Appropriators, that the Legislature was forced to interpose: and, accordingly, it is enacted by *stat. 15 R. 2. c. 6.* that in all appropriations of churches, the diocesan bishop shall ordain (in proportion to the value of the church) a competent sum to be distributed among the poor parishioners annually; and that the vicarage shall be sufficiently endowed. It seems the parish were frequently sufferers, not only by the want of divine service, but also by withholding those alms, for which, among other purposes, the payment of tithes was originally imposed: and therefore, in this act, a pension is directed to be distributed among the poor parochians, as well as a sufficient stipend to the Vicar. But he, being liable to be removed at the pleasure of the Appropriator, was not likely to insist too rigidly on the legal sufficiency of the stipend; and therefore, by *stat. 4 Hen. 4. c. 12.* it is ordained, that the Vicar shall be a secular person, not a member of any religious house; that he shall be Vicar perpetual, not removeable at the caprice of the monastery; and that he shall be canonically instituted and inducted, and be sufficiently endowed, at the discretion of the Ordinary, for these three express purposes: to do divine service; to inform the people; and to keep hospitality.

From this statute we may date the origin of the present Vicarages; for, before this time, the Vicar was nothing more than a temporary curate; and when the church was appropriated to a monastery, he was generally one of their own body; that is, one of the *regular* clergy; for the monks, who lived *secundum regulas* of their respective houses or societies, were denominated regular clergy, in contradiction to the parochial clergy, who performed their ministry in the world, *in seculo*; and who, from thence, were called *secular* clergy. All the tithes or dues of the church of common right belong to the Rector; or to the Appropriator or Impropiator, who have the same rights as the Rector; and the Vicar is entitled only to that portion which is expressed in his endowment; or what his predecessors have

immemorially enjoyed by prescription, which is equivalent to a grant or endowment. These endowments frequently invest the Vicar with some part of the great tithes; therefore the words *rectorial* and *vicarial* tithes have no definite signification: but *great* and *small* tithes are technical terms; and which are, or ought to be, accurately defined and distinguished by the law. 1 *Comm. c. 11. in n.* See this Dict. title *Tithes*.

The endowments, in consequence of these statutes, have usually been by a portion of the glebe, or land, belonging to the Parsonage, and a particular share of the tithes, which the Appropriators found it most troublesome to collect, and which are therefore generally called *privy* or *small* tithes; the greater, or *predial*, tithes being still reserved to their own use. But one and the same rule was not observed in the endowment of all vicarages. Hence some are more liberally, and some more scantily, endowed: and hence the tithes of many things, as wood in particular, are in some parishes *rectorial*, and in some *vicarial*, tithes. 1 *Comm. c. 11.*

The distinction therefore of a Parson and Vicar is this: The Parson has for the most part the whole right to all the ecclesiastical dues in his parish; but a vicar has generally an appropriator over him, entitled to the best part of the profits, to whom he is in effect perpetual curate, with a standing salary. Though in some places the vicarage has been considerably augmented by a large share of the great tithes; which augmentations were greatly assisted by *stat. 29 Car. 2. c. 8.* enacted in favour of poor Vicars and Curates; which rendered such temporary augmentations (when made by the appropriators) perpetual.

A vicar indeed must *necessarily* have an appropriator over him, or a sinecure Rector, who in some books is considered as, and called, an Appropriator. Of benefices, some have never been appropriated; consequently, in those there can be no Vicar, and the incumbent is Rector, and entitled to all the dues of the church. Some were appropriated to secular ecclesiastical corporations, which appropriations still exist, except perhaps some few which may have been dissolved; others were appropriated to the Houses of the regular clergy; all which appropriations, at the dissolution of monasteries, were transferred to the Crown; and, in the hands of the King or his grantees, are now called *Impropriations*; but in some appropriated churches no perpetual Vicar has ever been endowed; in that case, the officiating minister is appointed by the Appropriator or Impropriator, and is called a perpetual Curate. 1 *Comm. c. 11. in n.* See further titles *Vicar*; *Vicarage*.

II. THE method of becoming a Parson or Vicar is much the same. To both there are four requisites necessary: holy orders; presentation; institution; and induction. The method of conferring the holy orders of deacon and priest, according to the liturgy and canons, is foreign to the present purpose, any farther than as they are necessary requisites to make a complete Parson or Vicar. See 2 *Burn. Eccl. Law*, 103. By common Law, a Deacon, of any age, might be instituted and inducted to a parsonage or vicarage; but it was ordained by *stat. 13 Eliz. c. 12.* that no person under 23 years of age, and in deacon's orders, should be presented to any benefice with cure; and if he were not ordained Priest within one year after his induction, he

should be *ipso facto* deprived: and now, by *stat. 13. & 14 Car. 2. c. 4.* no person is capable to be admitted to any benefice, unless he hath been first ordained a priest; and then he is, in the language of the law, *A Clerk in orders*. But if he obtains orders, or a licence to preach, by money or corrupt practices, (which seems to be the true, though not the common notion of simony,) the person giving such orders forfeits 40*l.* and the person receiving 10*l.* and is incapable of any ecclesiastical preferment for seven years afterwards. *Stat. 31 Eliz. c. 6:* and see further this Dictionary, title *Ordination*.

Any Clerk may be presented to a parsonage or vicarage; that is, the patron, to whom the advowson of the church belongs, may offer his Clerk to the Bishop of the diocese to be instituted. A layman also may be presented; but he must take Priest's orders before his admission. 1 *Burn. Eccl. Law*, 103. As to Advowsons, or the right of presentation, which are a species of private property, see this Dictionary, title *Advowson*.

But when a clerk is presented, the Bishop may refuse him upon many accounts. As, if the patron is excommunicated, and remains in contempt forty days. 2 *Roll. Abr.* 355. Or if the clerk be unfit: *Glanv. l. 13. c. 20*; which unfitness is of several kinds. First, with regard to his person; as if he be a bastard; (though that incapacity seems now exploded, see *Bastard*;) an outlaw, an excommunicate, an alien, under age, or the like. 2 *Roll. Abr.* 356: 2 *Inst.* 632: *Stats. 3 Ric. 2. c. 3*: 7 *Ric. 2. c. 12*. Next, with regard to his faith or morals; as for any particular heresy, or vice that is *malum in se*: but if the Bishop alleges only in generals, as that he is *schismaticus inveteratus*, or objects a fault that is *malum prohibitum*, merely as haunting taverns, playing at unlawful games, or the like; it is not good cause of refusal. 5 *Rep.* 58. Or, lastly, the clerk may be unfit to discharge the pastoral office, for want of learning. In any of which cases the Bishop may refuse the clerk. In case the refusal is for heresy, schism, inability of learning, or other matter of ecclesiastical cognizance, there the Bishop must give notice to the patron of such his cause of refusal, who, being usually a layman, is not supposed to have knowledge of it; else he cannot present by lapse: but, if the cause be temporal, there he is not bound to give notice. 2 *Inst.* 632. See title *Advowson* II.

If an action at law be brought by the Patron against the Bishop for refusing his clerk, the Bishop must assign the cause. If the cause be of a temporal nature and the fact admitted, (as, for instance, outlawry,) the judges of the King's Courts must determine its validity, or whether it be sufficient cause of refusal; but if the fact be denied, it must be determined by a jury. If the cause be of a spiritual nature, (as, heresy, particularly alleged,) the fact, if denied, shall also be determined by a jury; and if the fact be admitted or found, the Court, upon consultation, and advice of learned divines, shall decide its sufficiency. 2 *Inst.* 632. If the cause be want of learning, the Bishop need not specify in what points the clerk is deficient, but only allege, that he is deficient; for the *stat. 9 Edw. 2. st. 1. c. 13*, is express, that the examination of the fitness of a person presented to a benefice belongs to the ecclesiastical judge. 5 *Rep.* 58: 3 *Lev.* 313. But because it would be nugatory in this case to demand the reason of refusal from the Ordinary, if the patron were bound to abide by his determination, who has already pronounced his clerk unfit; therefore,

if the Bishop returns the clerk to be *minus sufficiens in literaturâ*, the Court shall write to the Metropolitan, to re-examine him, and certify his qualifications; which certificate of the Archbishop is final. 2 *Inst.* 632.

If the Bishop hath no objections, but admits the patron's presentation, the clerk so admitted is next to be instituted by him; which is a kind of investiture of the spiritual part of the benefice; for by institution the care of the souls of the parish is committed to the charge of the clerk. When a vicar is instituted, he (besides the usual forms) takes, if required by the Bishop, an oath of perpetual residence; for the maxim of law is, that *vicarius non habet vicarium*: and, as the non-residence of the Appropriators was the cause of the perpetual establishment of vicarages, the law judges it very improper for them to defeat the end of their constitution, and by absence to create the very mischief which they were appointed to remedy; especially as, if any profits are to arise from putting in a curate and living at a distance from the parish, the Appropriator, who is the real Parson, has undoubtedly the elder title to them. And it appears that the Bishop cannot dispense with the Vicar's oath, which is, that he will be resident upon his vicarage, unless dispensed withal by his diocesan. 1 *Burn. Eccl. Law*, 148.

When the Ordinary is also the patron, and confers the living, the presentation and institution are one and the same act, and are called a Collation to a benefice. See title *Advowson* I. By institution or collation the church is full, so that there can be no fresh presentation till another vacancy, at least in the case of a common patron; but the church is not full against the King, till induction: nay, even if a clerk is instituted upon the King's presentation, the Crown may revoke it before induction, and present another clerk. *Co. Litt.* 344. Upon institution also the clerk may enter on the parsonage house and glebe, and take the tithes; but he cannot grant or let them, or bring an action for them, till induction. 1 *Comm. c.* 11. *p.* 391. See further this Dictionary, title *Institution*.

Induction is performed by a mandate from the Bishop to the Archdeacon, who usually issues out a precept to other clergymen to perform it for him. It is done by giving the clerk corporal possession of the church, as by holding the ring of the door, tolling a bell, or the like; and is a form required by law, with intent to give all the parishioners due notice, and sufficient certainty of their new minister, to whom their tithes are to be paid. This therefore is the investiture of the temporal part of the benefice, as institution is of the spiritual. See further title *Induction*. And when a clerk is thus presented, instituted, and inducted into a rectory, he is then, and not before, in full and complete possession, and is called in law *persona impersonata*, or Parson impersonatee. *Co. Litt.* 300.

The *Duties* of a Parson or Vicar are principally of ecclesiastical cognizance; see this Dictionary, title *Preaching*; those only excepted which are laid upon him by statute. And those are indeed so numerous, that it is impracticable to recite them here with any tolerable conciseness or accuracy; they are to be gathered chiefly from such authors as have compiled treatises expressly upon this subject; though these, it is remarked by *Blackstone*, are not very much to be relied on. The article of *Residence* is now regulated in *England* by the *stat.* 43 *Geo.* 3. *c.* 84. and in *Ireland* by *stat.* 48 *Geo.*

3. c. 66. Legal residence is not only in the parish, but also in the parsonage house, if there be one: for it hath been resolved, that the statute intended residence, not only for serving the cure, and for hospitality; but also for maintaining the house, that the successor also may keep hospitality there. 6 *Reft.* 21. And if there be no parsonage house, it hath been holden that the incumbent is bound to hire one, in the same parish, to answer the purposes of residence. See *Cowp.* 429: 5 *Burr.* 2722 and this Dictionary, title *Residence*.

For the more effectual promotion of this important duty of residence in the parochial clergy in *England*, a provision is made by the *stat.* 17 *Geo.* 3. c. 53. for raising money upon ecclesiastical benefices, and to be expended in rebuilding, or repairing, the houses belonging to such benefices.

This statute enables the Incumbent, when there is no parsonage house, or where it is so ruinous as not to be repaired with one year's income of the living, on a certificate of a Surveyor on Oath, before a justice, of the state of the buildings on the glebe, and of timber fit for repair, which, with an account on Oath of the annual value of the living, is to be laid before the Patron and Ordinary, to borrow of any person, with the consent of the Patron and Ordinary, upon mortgage for 25 years of the revenue of the living, a sum not exceeding two years' clear value, to be laid out in repairs, building, or the purchase of a house. Such mortgage deed shall be registered with the registrar of the diocese. Mortgagee may recover his interest by distress and sale, or the Ordinary may sequester the profits of the Living. The money so borrowed shall be paid into the hands of a person appointed by the Ordinary, Patron, and Incumbent, who is to contract and pay for repairs. The annual payments may be apportioned between deceased Incumbent, and his successor by arbitration. The interest of the money so borrowed is to be repaid by the Incumbent yearly, and *5l. per cent.* upon the principal remaining due, or *10l. per cent.* if he does not reside 20 weeks within a year. And where the income is *100l.* a year, and the Incumbent does not reside 20 weeks within a year, the Patron and the Ordinary are empowered to borrow and apply money without his consent. Ordinary, Patron, and Incumbent may purchase a house (within one mile of the church) and land either under this act, or by exchange of part of the glebe. The Governors of Queen *Anne's* bounty may lend money upon such mortgages at *4l. per cent.* interest, and *100l.* upon a living under *50l.* a year, without any interest. Colleges and other Corporations may lend money for this purpose upon their own livings without interest. Where the Crown is Patron, the consent of the Treasury, &c. is requisite. Lords of manors, &c. empowered to grant wastes for building such houses. The statute contains the forms and modes of proceeding to fulfil its various purposes.

As under this statute the money borrowed was directed to be discharged by paying *5l. per cent.* yearly, upon the principal *remaining due*; it was directed by 21 *Geo.* 3. c. 66. such instalments should be calculated on the original sum advanced, so that it should be paid, at the farthest, within 20 years.

By 43 *G.* 3. c. 107. the Governors of Queen *Anne's* bounty are empowered to build parsonage houses on livings augmented by that fund: and by 43 *G.* 3. c. 108. persons possessed in their own right, by deed enrolled, or by will executed, three months before their de-

cease, give lands not exceeding five acres, or personal property not exceeding 500*l.* for building parsonages (or churches,) &c.

Various acts have been passed for the effectuating of the like beneficent purposes in *Ireland*, viz. 43 G. 3. c. 106: 46 G. 3. c. 60: 48 G. 3. c. 65. See title *First Fruits*.

III. ALTHOUGH there is but one way, whereby one may become a Parson or Vicar; there are many circumstances, besides death, by which one may cease to be so.

By *Cession*, in taking another benefice. For by *stat.* 21 *Hen.* 8. c. 13. if any one having benefice of 8*l.* *per ann.* or upwards, (according to the present valuation in the King's books, *Cro. Car.* 456.) accepts any other, the first shall be adjudged void, unless he obtains a dispensation; which no one is entitled to have, but the chaplains of the King and others therein mentioned; the brethren and sons of Lords and Knights; (but not of baronets, as that dignity did not exist at the time of the *stat.* 21 *H.* 8.) and doctors and bachelors of divinity and law, admitted by the universities of this realm. See this Dictionary, titles *Chaplain*; *Plurality*. And a vacancy thus made, for want of a dispensation, is called *Cession*. See this Dictionary, title *Cession*.

By *Consecration*; for when a Clerk is promoted to a bishopric, all his other preferments are void, the instant that he is consecrated. See this Dictionary, title *Bishops*. But there is a method, by the favour of the Crown, of holding such livings in *commendam*. *Commenda*, or *ecclesia commendata*, is a living commended by the Crown to the care of a clerk, to hold till a proper pastor is provided for it. This may be temporary for one, two, or three years; or perpetual; being a kind of dispensation to avoid the vacancy of the living, and is called a *commenda retinere*. There is also a *commenda recipere*, which is to take a benefice *de novo*, in the Bishop's own gift, or the gift of some other patron consenting to the same; and this is the same to him as institution and induction are to another clerk. See further this Dictionary, title *Commendam*.

By *Resignation*. But this is of no avail, till accepted by the Ordinary; into whose hands the resignation must be made. *Cro. Jac.* 198. See further this Dictionary, title *Resignation*.

By *Deprivation*; either, first, by sentence declaratory in the Ecclesiastical Courts, for fit and sufficient causes allowed by the Common Law; such as attainder of treason or felony, *Dyer* 108: *Jenk.* 210; or conviction of other infamous crime in the King's Courts; for heresy, infidelity, (*Fitz. Ab. tit. Trial* 54.) gross immorality, and the like; or, secondly, in pursuance of divers penal statutes, which declare the benefice void, for some non-feasance or neglect, or else some malfeasance or crime. As, for Simony; by *stats.* 31 *Eliz.* c. 6: 12 *Ann. st.* 2. c. 12; see title *Simony*;—for maintaining any doctrine in derogation of the King's supremacy, or of the thirty-nine articles, or of the Book of Common Prayer; by *stats.* 1 *Eliz.* cc. 1, 2: 13 *Eliz.* c. 12:—for neglecting, after institution, to read the liturgy and articles in the church, or make the declarations against popery, or take the abjuration oath; *stats.* 13 *Eliz.* c. 12: 13 & 14 *C.* 2. c. 4: 1 *Geo.* 1. *st.* 2. c. 6:—for using any other form of prayer than the liturgy of the church of *England*; *stat.* 1 *Eliz.* c. 2:—or for absenting himself sixty days in one year from a benefice belonging to a popish patron, to which the clerk was presented by either of the universities; *stat.* 1 *W. & M. st.*

1. c. 26; see title *Papist*: in all which and similar cases the benefice is *ipso facto* void, without any formal sentence of deprivation. 6 *Repl.* 29, 30: 1 *Comm. c.* 11.

For further matter relating to this subject, see this Dict. titles *Church*; *Clergy*; *Curate*; *Quare Impedit*; *Tithes*, &c.

PARSONAGE, *Personatus*, *Personagium*.] Is sometimes taken for a dignitary in a church, and sometimes for the benefice itself. *Cowell*.

Parsonage, or rectory, is a parish church, endowed with a house, glebe, tithes, &c.; or a certain portion of lands, tithes, and offerings, established by law, for the maintenance of the minister who hath the cure of souls, and though properly a Parsonage or rectory doth consist of glebe land and tithes; yet it may be a rectory, though it have no glebe, but the church and churchyard: also there may be neither glebe nor tithes, but annual payments in lieu thereof. *Pars. Counc.* 190. The rights to the Parsonage and church lands are of several natures; for the Parson hath a right to the possession; the Patron hath the right of presentation; and the Ordinary a right of investiture, &c. But the rights of the Patron and Ordinary are only collateral rights; neither of them being capable of possessing or retaining the church themselves; though no charge can be laid on the church or Parsonage, but by the consent and agreement of all of them. *Hughes's Pars. Law*, 188. See titles *Parson*; *Appropriation*.

PARSON MORTAL. The rector of a church instituted and inducted, for his own life, was called *Persona Mortalis*: and any collegiate or conventional body, to whom the church was for ever appropriated, was termed *Persona immortalis*. *Cartular. Rading. MS. f.* 182. See titles *Parson*; *Appropriation*.

PARTES FINIS NIHIL HABUERUNT, &c. Is an exception taken against a fine levied. 3 *Repl.* 88. See title *Fine of Lands*.

PARTICIPATIO, Is the charity so called, by which the poor are made *participes* of other men's goods. We read it in several places in the *Monast.* 2 *tom. page* 321.

PARTIES, Are those who are named in a deed or fine, as parties to it; as those who levy the fine, and to whom the fine is levied: so they who make any deed, and they to whom it is made, are called *Parties to the Deed*. *Cowell*. See titles *Deeds*; *Fine of Lands*.

PARTITION, *Partitio*.] The dividing land descended by the Common Law, or custom, among co-heirs or parceners, where there are two at least. In *Kent*, where the land is of gavelkind nature, they call their Partition shifting, from the Saxon *shifian*, to divide. In *Latin* it is called *hercissere*. Partition also may be made by joint-tenants, or tenants in common, by assent, deed, or writ. See titles *Joint-tenants*; *Parceners*; *Tenants in Common*.

PARTITIONE FACIENDA, mentioned in *stat. 31 H. 8. c. 1*.] A writ that lies for those who hold lands or tenements *pro indiviso*, and would sever to every one his part; against those who refuse to join in Partition, as coparceners, tenants in gavelkind, &c. *Old Nat. Brev.* 142: *F. N. B.* 61. See title *Parceners*; *Joint-tenants*; *Tenants in Common*.

PARTNERS, Are where two or more persons agree to come into any trade or bargain in certain proportions agreed upon. See title *Bankrupt*, IV. 7.

PART-OWNERS, Those who are concerned in ship matters, and have joint shares therein. See title *Insurance*.

PARTY-WALLS; See titles *Fire*; *London*.

PARVISE, *Seldon* (in his Notes on *Fortescue*, c. 51.) defines it to be, an afternoon's exercise, or moot for the instruction of young students; bearing the same name originally with the *Parvisie* at *Oxford*. *Seld. Notes*, page 56. *Chaucer* mentions it in one of his prologues.

PASCHA CLAUSUM, The octaves of *Easter* or *Low Sunday*, which closes that solemnity: and *die (tali) post Pascha Clausum*, is a date in some of our old deeds. The first statute of *Westminster*, anno 3 *Ed. 1.* is said to be made the *Monday* after *Easter* week; *Condemain de la cluse de Pasche*, &c.

PASCHA FLORIDUM, The *Sunday* before *Easter*, called *Palm Sunday*; when the proper hymn or gospel sung was *occurent turbe cum floribus & palmis*, &c. *Cartular. Abbat. Glaston. MS. 75.*

PASCHAL RENTS, Rents or yearly tributes paid by the clergy to the Bishop or Archdeacon, at their *Easter* visitations.

PASCUA, A particular meadow or pasture ground, set apart to feed cattle. See *Lindwood. Prov. Ang. l. 3. c. 18*: and *post, pastura*.

PASCUAGE, *pascuagium*, Fr. *pasceage*.] The grazing or pasturing of cattle. *Mon. Angl. ii. 23.* The same with *pannage*.

PASNAGE, And *pathnage* in woods, &c. See title *Pannage*.

PASSAGE, *passagium*.] Is properly over water, as *way* is over land; it relates to the sea, and great rivers, and is a *French* word signifying *transitum*.

Passagio is also the name of a writ directed to the keepers of the ports to permit a man to pass over sea, who has the King's leave. *Reg. Orig. 193.* The prices of passage at *Dover*, &c. were limited by *stat. 4 Ed. 3. c. 8.* repealed 21 *Jac. 1. c. 28. § 11.* None to pass out of the realm without the King's licence, *stat. 5 R. 2. st. 1. c. 2.* repealed 4 *Jac. 1. c. 1. § 22.* See titles *King*; *Ne exeat regno*. Passage from *Kent* to *Calais* restrained to *Dover*. *Stat. 4 Ed. 4. c. 10.* repealed by 21 *Jac. 1. c. 28. § 11.*

PASSAGIUM, Or *Passagium Regis*, A voyage or expedition to the Holy Land, when made by the Kings of *England* in person. *Cowell*.

PASSATOR, He who has the interest or command of the passage of a river, or the Lord to whom a duty is paid for passage. *Cowell*.

PASSIAGIARIUS, A ferry-man. *Thorn's Chronicle*, in an. 1287.

PASS-PORT, A compound of two *French* words, *viz. passer, transire*, and *port, portus*, a haven. It signifies a licence, for the safe passage of any man from one place to another. See *stat. 2 E. 6. c. 2*; and titles *Alien IV*; *Safeconducts*.

PASTITIUM, A pasture field. *Domesday*, per *Gale* 761.

PASTORAL STAFF. The form of it was straight, which signified *rectum regimen*. All the top part of it was crooked, and the other part sharp: the crooked signified, that the bishop presided over the people; and the sharp signified, to punish the stubborn. *Cowell*.

PASTURE, Is any place generally where cattle may feed; and feeding for cattle is called *Pasture*, wherefore feeding grounds are called common of *Pasture*: but common of pasture is properly a right of putting beasts to pasture in another man's soil; and in this there is an interest of the lord and of the tenant. *Wood's Inst. 196, 197.*

For in those waste grounds, which are usually called *Commons*, the property of the soil is generally in the lord of the manor; as in common fields it is in the particular tenants. And common of Pasture is either appendant, appurtenant, because of vicinage, or in gross. See title *Common*.

PASTUS, The procuration, or provision, which tenants were bound to make for their lords at certain times, or as often as they made a progress to their lands: This, in many places, was turned into money. *Hoc modo per ævum liberabo à Pastu Regis & Principum. Chart. Walsasi Regis Merciorum in Mon. Angl. i. 123.*

PATENTEE, One to whom the King grants his letters patent. 7 *Ed. 6. c. 3.*

PATENTS, The King's writings, sealed with the Great Seal, having their name from being *open*: and they differ from writs. *Crompt. Jurisd. 126.* The king is to advise with his Council touching grants and Patents made of his estate, &c. And in petitions for lands, annuities, or offices, the value is to be expressed; also a former Patent is to be mentioned where the petition is for a grant in reversion, or the Patents thereupon shall be void. *Stats. 1 Hen. 4. c. 6: 6 Hen. 8. c. 15.* Patents which bear not the date and day of delivery of the King's warrants into Chancery, are not good. *Stat. 18 Hen. 6. c. 1.*—Where the King's Patent creates a new estate, of which the law doth not take knowledge; the Patents are void. 8 *Rept. 1: 5 Rept. 93.* But Patents shall not be avoided by nice constructions: if a Patent may be taken to two intents, and is good as to one, and not as to the other, it is valid. *Jenk. Cent. 138.* When the King would pass a freehold, it is necessary that the Patent be under the Great Seal; and it ought to be granted *de advisamento* of the Chancellor of the Exchequer and Lord Treasurer in the usual manner. *Fitzgib. 291.* See titles *Grants of the King; Scire Facias.*

As to Patents for new inventions, see title *Monopoly*. For Patents of peerage, title *Peer*. For Patent of precedence, title *Barrister*.

PATRIA, The country; the men of a neighbourhood: Thus when it is said *inquiratur per patriam*, a jury of the neighbourhood is meant. In like manner, *Assisa vel recognitio per assisam, idem est quod recognitio Patriæ.* *Cowell.* See titles *Jury; Assise.*

PATRIMONY, An hereditary estate, or right descended from ancestors. The legal endowment of a Church, or Religious House, was called *ecclesiastical Patrimony*; and the lands and reversions, united to the See of Rome, are called *St. Peter's Patrimony.* *Cowell.*

PATRINUS, A godfather; as *Matrina* is a god-mother. *Ll. H. 1.*

PATRITIUS, An honour conferred on men of the first quality, in the time of the *English Saxon Kings.* *Mon. Ang. i. 13.*

PATRON, He who hath the disposition of an ecclesiastical benefice. See titles *Advowson; Parson.*

The Patron's rights is the most worthy and first act and part of a promotion to a benefice, and is granted and pleaded by the name of *libera dispositio ecclesiæ.* *Hob. 152.* But during the vacancy of a church, the freehold of the glebe is not in the Patron; for it is in abeyance. 8 *H. 6. 24: Litt. 144.* A Patron shall not have an action for trespass done when the Church is vacant: and if a man who hath a right to glebe lands, releaseth the same to the Patron, that is not good; because the Patron has not any estate in the land. 11 *H. 6. 4.* If the Patron grants

a rent out of a church, it is void even against himself. 38 *Ed.* 3, 4. See further, this Dict. titles *Advowson*; *Parson*; *Vicar*, &c.

PAVAGE, *Pavagium*.] Money paid towards paving the streets or highways. *Rex concessit Pavagium ville de Huntingdon per quinquennium. Pla. Parl.* 35 *Edw.* 1.

PAVING. See *London*, *Scavengers*, *Police*.

PAUPER, A poor man; according to which we have a term in law, to sue *in formâ pauperis*.

Before a person is admitted to sue *in formâ pauperis*, he must have counsel's hand to his petition, certifying the judge to whom the petition is directed, that he conceives the petitioner hath good cause of action; he must also annex an affidavit to his petition, that he is not worth five pounds, all his debts paid, except wearing apparel, and his right to the matter in question. *Lil. Reg.* 633.

None ought to be admitted to sue *in formâ pauperis* in an action on the case, for words. *Lil. Reg.* 633.

A person admitted to sue *in formâ pauperis*, can only sue in that cause for which he is admitted, & sic toties quoties. *Lil. Reg.* 633.

It seems that, after the statutes which introduced costs, neither plaintiffs nor defendants could sue or defend *in formâ pauperis*; for that would be a means of depriving the other party of the costs given him by statute: and as *stat.* 11 *Hen.* 7. c. 12. enables persons only to sue as Paupers; and as the *stat.* 23 *Hen.* 8. c. 15. excepts only plaintiffs who are Paupers from paying costs; it seems, that one cannot be admitted in a civil action to defend as a Pauper. But it hath been adjudged, that a person may be admitted to defend an indictment *in formâ pauperis* for a misdemeanor, such as a conspiracy, keeping a disorderly house, &c. for in such proceedings there being no costs, the judges have a discretionary power of admitting or refusing them by the Common Law. *Pasch.* 9 *Geo.* 2. *The King v. Wright*. See *stat.* 2 *Geo.* 2. c. 28. § 8, by which persons are allowed to defend *in formâ pauperis* on actions and informations relating to the Customs.

It is said, that Paupers ought not to be admitted to remove causes out of inferior Courts, but ought to satisfy themselves with the jurisdiction within which their actions properly lie. 1 *Mod.* 368.

By the orders of the Courts, if the party admitted to sue *in formâ pauperis* give any fee or reward to his counsel or attorney, or make any contract, or agreement with them, he shall from thenceforth be dispaupered, and not be afterwards admitted again in that suit to prosecute *in formâ pauperis*. *Ord. Cur.* 94.

Also, if it shall be made appear to the Court, that any person prosecuting *in formâ pauperis* hath sold or contracted for the benefit of the suit, or any part thereof, while the same depends, such cause shall be from thenceforth totally dismissed the Court. *Ord. Cur.* 95.

It is said, that if a Pauper gives notice of trial, and does not proceed, he shall be dispaupered. 1 *Salk.* 506. See further title *Costs* II.

PAWN, *Pignus*.] A pledge or gage for payment of money lent: it is said (*risum teneatis?*) to be derived à pugno, quia res quæ pignori dantur, pugno vel manu traduntur. *Lit. Dict.* The party who pawns goods, hath a general property in them; they cannot be forfeited by the Pawnee, or party who hath them in Pawn, for any offence of his; nor be taken in execution for his debt; neither may they otherwise be put in execution, till the debt for which they are pawned is satisfied. *Litt. Rep.* 332. For the absolute property is in another: therefore they

are not alienable, nor, by consequence, forfeitable; because they cannot be forfeited without loss and danger to the absolute owner; and all qualified possessors do take the property under the restriction to preserve the property of the right owner. *Bro. title Attachment in Assise* 20.

If a man pawns goods for money, and afterwards a judgment is had against the Pawner at the suit of one of the creditors; the goods in the hands of the Pawnee shall not be taken in execution, until the money is paid to the Pawnee: because he had a qualified property in them, and the judgment creditor only an interest. 3 *Bulst.* 17. And when a person hath jewels in Pawn for a certain sum, and he who pawned them is attainted, the King shall not have the jewels unless he pay the money. *Plowd.* 487. For the alteration of the general property doth not alter the special property in the Pawnee. 2 *H.* 7. 1: 1 *Bulst.* 29.

If a man pledge goods and then is outlawed, he cannot redeem them; because *then* the absolute property is in the King; but if the outlawry is reversed, then the person is reinstated in his property, as if there had been no outlawry; and therefore may redeem them. 1 *Bulst.* 29.

The Pawnee of goods hath a special property in them, to detain them for his security, &c. and he may assign the Pawn over to another, subject to the same conditions: and if the Pawnee die before redeemed, his executors shall have it upon the like terms as he had it.

If goods pawned are perishable, and no day being set for payment of the money, they lie in Pawn till spoiled, without any default in him who hath them in keeping; the party who pawned them shall bear the damage; for it shall be adjudged his fault that he did not redeem them sooner: and he, to whom pawned, may have action of debt for his money. Also, if the goods are taken from him, he may have action of trespass, &c. *Co. Litt.* 89, 208: *Yelv.* 179.

Where goods are pawned for money borrowed, without a day set for redemption, they are redeemable at any time during the life of the borrower. They may be redeemed after the death of him to whom pawned; but not after the death of him who pawned the goods. 2 *Cro.* 245: *Noy* 137: 1 *Bulst.* 9. But where a day is appointed, and the Pawner dieth before the day, his executors may redeem the Pawn at the day, and this shall be assets in their hands. 1 *Bulst.* 30, 31. If goods are redeemable at a day certain, it must be strictly observed; and the Pawnee, in case of failure of payment at the day, may sell them. 1 *Rol. Rep.* 181, 215. But still the right owner has his redemption in equity, as in case of a mortgage. 1 *Inst.* 205: *Shep.* 106.

He, who borrows money on a Pawn, is to have the pledge again, when he repays it; or he may have action for the detainer; and his tender of the money revests the special property. 2 *Cro.* 244. And it hath been held, that where a broker or Pawnee refuses (upon tender of the money) to redeliver the goods in Pawn, he may be indicted; because being secretly pawned, it may be impossible to prove a delivery for want of witnesses, if *trover* should be brought for them. 3 *Salk.* 268. Adjudged, that if goods are lost, after the tender of money, the Pawnee is liable to make them good to the owner; for, after tender, he is a wrongful detainer; and he who keeps goods wrongfully must answer for them at all events; his wrongful detainer being the occasion of the loss. *Cro. Jac.* 243: *Yelv.* 149; 1 *Bulst.* 29: *Bro. Bail-*

ment, 7: 1 *Rol. Rep.* 129: 1 *Inst.* 89. But if they are lost before a tender, it is otherwise; the Pawnee is not liable, if his care of keeping them was exact; and the law requires nothing of him, but only that he should use an ordinary care in keeping the goods, that they may be restored on payment of the money for which they were deposited; and in such case if the goods are lost, the Pawnee hath still his remedy against the Pawner for the money lent. 2 *Salk.* 522: 3 *Salk.* 268.

If the Pawn is laid up, and the Pawnee robbed, he is not in general answerable; though if the Pawnee useth the thing, as a jewel, watch, &c. that will not be the worse for wearing, which he may do, it is at his peril; and if he is robbed, he is answerable to the owner, as the using occasioned the loss, &c. 2 *Salk.* 522: 3 *Salk.* 268: see *Co. Litt.* 89. a: 3 *Inst.* 108: 4 *Co.* 83: *Palm.* 551: *Ow.* 123. *Yelv.* 178: *Cro. Jac.* 244: 1 *Bulst.* 29, 30: 1 *Rol. Rep.* 181. If the Pawn is of such a nature, that the keeping is a charge to the Pawnee, as a cow, or a horse, &c. he may milk the one, or ride the other; and this shall go in recompence for his keeping. Things, which will grow the worse by usage, as apparel, &c. he may not use. *Owen* 124.

A person borrowed 100*l.* on the Pawn of jewels, and took a note from the lender, acknowledging them to be in his hands, for securing the money; afterwards, he borrowed several other sums of the same person, for which he gave his notes, without taking any notice of the jewels. As in this case it was natural to think the lender would not have advanced the sums on note only, but on the credit of the pledge in his hands before; it was decreed in equity, that if the borrower would have his jewels, he must pay all the money due on the notes. *Preced. Chanc.* 419, 421.

A factor cannot pawn the goods of his principal. *Strange* 1178. He to whom goods are delivered for safe custody cannot pawn them. *Strange* 1187. There can be no market-overt for Pawning. *Ibid.* Where money is lent on a pledge, the borrower is personally liable to the payment, unless there be an agreement to the contrary. *Strange* 919. See further, this Dictionary, title *Bailment*; and *post.* *Pawn-brokers.*

PAWNAGE, In woods and forests for swine; see *Pannage*.

PAWN-BROKERS. By the Stamp Acts, Pawn-brokers are annually to take out a licence on a stamp.

By *stat.* 39, 40 *Geo.* 3. c. 99. rates of profit are allowed to Pawn-brokers; and regulations are made to prevent oppression by them, *viz.*

For every pledge upon which there shall have been lent not exceeding 2*s.* 6*d.* one halfpenny is allowed as interest, &c. for any time during which the said pledge shall remain in pawn, not exceeding one calendar month; and the same for every month afterwards, including the current month in which such pledge shall be redeemed, although such month shall not be expired. For 5*s.* one penny; 7*s.* 6*d.* one penny halfpenny; 10*s.* two-pence; 12*s.* 6*d.* two-pence halfpenny; 15*s.* three-pence; 17*s.* 6*d.* three-pence halfpenny; 1*l.* four-pence; and so on progressively and in proportion for any sum not exceeding 40*s.*; and for any intermediate sum between 2*s.* 6*d.* and 40*s.* at the rate of 4*d.* for 20*s.*

And for every sum exceeding 40*s.* and not exceeding 42*s.* eight pence; and for every sum exceeding 42*s.* and not exceeding 10*l.* at the rate of 3*d.* and no more for the loan of every 20*s.* of such money

lent by the calender month; and so in proportion for any fractional sum. § 1—3.

A party applying for the redemption of goods pawned, within seven days after the expiration of any month, may redeem them without paying any thing for the seven days, and applying after seven, and within fourteen days, pays the profit for one month and a half of another month; but after the expiration of the first fourteen days the Pawn-broker may take for the whole month. § 5.

Entries to be made and duplicates given. § 6, 7.

Any person fraudulently pawning the goods of another, and convicted before a justice, shall forfeit from 5*l.* to 20*s.* and also the value of the goods pawned, &c. to be ascertained by the justice; and on failure of payment, may be committed to the House of Correction, for not more than three months, and be publicly whipped; the forfeitures, when paid, to be applied towards making satisfaction to the party injured, and defraying the costs; the overplus, if any, to the poor of the parish. § 8.

Any person, counterfeiting or altering a duplicate, may be seized and taken before a justice; who is to commit the party to the House of Correction, for not more than three months, nor less than one. § 9.

If any person shall offer to pawn any goods, refusing to give a satisfactory account of himself, and the goods; or if there shall be reason to suspect that such goods are stolen; or if any person not entitled, shall attempt to redeem goods pawned; they may be taken before a Justice, who shall commit them for further examination: and if it appears that the goods were stolen, or illegally obtained, or that the person offering to redeem the same has no title or pretence to them; the Justice is to commit him to be dealt with according to law, where the nature of the offence shall authorize such commitment by any other law; or otherwise, for not more than three months. § 10.

Persons buying or taking in pledge unfinished goods, or any linen, &c. entrusted to be washed, shall forfeit double the sum lent, and restore the goods. § 11.

A justice may grant a search warrant; in executing which, a peace officer may break open doors, and the goods, if found, shall be restored to the owner. § 12, 13.

Pawn-brokers, refusing to deliver up goods pledged within one year, on tender of the money lent, and interest, on conviction, a Justice is empowered to commit the offender till the goods be delivered up, or reasonable satisfaction made. § 14.

Persons producing notes, are not to be deemed owners, unless on notice to the contrary from the real owner. § 15.

Duplicates being lost, the owners, on oath before a Justice, shall be entitled to another from the Pawn-broker. § 16.

Goods to be sold by public auction after the expiration of one year; being exposed to public view, and catalogues thereof published, and two advertisements of sale by the Pawn-broker to be inserted in some newspaper two days at least before the first day's sale under penalty of 10*l.* to 40*s.* to the owner. § 17.

Pictures, prints, books, statutes, &c. shall be sold only four times in a year. § 18.

Pawnbrokers receiving notice from the owners of goods before the expiration of a year, shall not dispose of them, until after the expiration of three months from the end of the said year. § 19.

Pawnbrokers to enter an account of sales in their books of all goods pawned for upwards of ten shillings; and in case of any overplus by the sale, upon demand within three years, it shall be paid to the owner, the necessary costs, principal, and interest being deducted; persons possessing duplicates entitled to the inspecting of the books; and in case the goods shall have sold for more than the sum entered, or the further entries not made, or the overplus is refused to be paid, the offender shall forfeit 10*l.* and treble the sum lent, to be levied by distress. § 20.

Pawnbrokers shall not purchase goods whilst in their custody, or suffer them to be redeemed for that purpose; nor lend money to any person appearing to be under twelve years of age, or intoxicated, or purchase duplicates of other Pawnbrokers, or buy any goods before eight in the forenoon, and after seven in the evening; nor receive any goods in pawn before eight in the forenoon or after eight at night, between *Michaelmas* and *Lady-day*, and before seven o'clock in the forenoon and after nine at night, during the remainder of the year; except till eleven o'clock on the evenings of *Saturday*, and that preceding *Good Friday* and *Christmas-day*; nor carry on the trade on any *Sunday*, *Good Friday*, or *Christmas-day*, or any *Fast* or *Thanksgiving-day*. § 20.

Pawnbrokers are to place in their shops a table of rates allowed by this act. § 21.

Pawnbroker's Christian and surname, and business, to be written over the door; under a penalty of 10*l.* half to the informer and half to the poor. § 23.

Pawnbrokers having sold goods illegally, or having embezzled or injured goods, Justices may award reasonable satisfaction to the owners, in case the same shall not amount to the principal and profit; or if it does, the goods shall be delivered to the owner, without paying any thing under a penalty of 10*l.* § 24.

Pawnbrokers to produce their books before any Justice, if required, on a penalty of 10*l.* to 5*l.* § 25.

Penalty on Pawnbrokers neglecting to make entry 10*l.* and for every offence against this act, where no penalty is provided, 40*s.* to 10*l.* half to the informer, the remainder to the poor. § 26.

Complaint shall, in all cases, be made within twelve months. § 27.

No person convicted of a fraud or felony may be an informer under this act. § 29.

Churchwardens to prosecute for every offence at the expence of the Parish, on notice from a Justice. § 28.

This act does not extend to persons lending money upon goods at 5 *per cent.* interest.

This act to extend to the executors, &c. of Pawnbrokers and Pawners. § 31.

The form of conviction is settled by § 33; and an appeal given to the Quarter Sessions. § 35.

PAYMENT of money *before* the day appointed, is in law Payment *at* the day; for it cannot, in presumption of law, be any prejudice to him, to whom the payment is made, to have his money before the time; and it appears, by the party's receipt of it, that it is for his own advantage to receive it then, otherwise he would not do it. Yet it is said, that defendant must not plead, that the plaintiff accepted it in full satisfaction; but that he paid it in full satisfaction. 5 *Repl.* 117.

Payment of a lesser sum, in satisfaction of a greater, cannot be a satisfaction for the whole; unless the payment be before the day: though the gift of an horse, or robe, &c. in satisfaction, may be good. *Ibid.* And where damages are uncertain, a less thing may be done in satisfaction of a greater. 4 *Mod.* 89.

Upon *solvit ad diem* pleaded, it is good evidence to *prove Payment* at any time after the day, and before action brought; and Payment, although after the day, may be pleaded to any action of debt, upon bill, bond, or judgment, or *scire facias* upon a judgment. 2 *Lil. Abr.* 287. *Stat.* 4 & 5 *Ann. c.* 16. But see 1 *Stra.* 652; where, on such a plea, proof was made of interest paid two years *after* the day, whereby the plea was *falsified*; which was made on *presumption* only; as the debt had not been demanded for thirty years. And though Payment after the day is good by way of discharge, it will not be so by way of satisfaction. 4 *Mod.* 250. Payment is no plea to debt on covenant, or an obligation, without acquittance; but if the obligation have a condition, it is otherwise. *Dyer* 25, 169. If a bond, &c. be for Payment of money; and no day is set, damages cannot be recovered till a demand is made. *Bridge.* 20. See title *Bond*.

For payment of rent, there are said to be four times: 1. A voluntary time, that is not satisfactory, and yet good to some purpose: as where a lessee pays his rent before the day, this gives seisin of the rent, and enables him to whom paid to bring his assize for it. 2. A time voluntary and satisfactory in some cases; when it is paid the morning of the last day, and the lessor dies before the end of the day, this is a good Payment to bind the heir or executor, but not the King. 3. The legal, absolute, and satisfactory time, which is a convenient time before the last instant of the last day, and then it must be paid. The 4th is satisfactory, and not voluntary, but coercive when forced and recovered by suit at law. *Co. Litt.* 200: 10 *Rep.* 127: *Plowd.* 172. See title *Rent*.

Payment of money shall be directed by him who pays it, and not by the receiver, &c. 5 *Rep.* 117: *Cro. Eliz.* 68. If the payer does not apply the Payment, the receiver may; but he must not apply it to an uncertain demand, as to a debt from a testator. *Strange* 1194. In the payment of a testator's debts by executors, they are to pay first judgments, mortgages, rent due by lease, &c. then bonds and bills, &c. 1 *Roll. Abr.* 927. See title *Executor* V. 6.

A bill drawn on *A.* to pay money for value received, is a good discharge of a debt, though the bill be not paid, unless the creditor return the bill in convenient time. *Show.* 155. *A.* gives *B.* a bill of exchange on *C.* in payment of a former debt; this is not allowable as evidence on *non assumpsit*, unless paid; for a bill shall never go in discharge of a precedent debt, except it be part of the contract that it should be so. 1 *Salk.* 124. When a merchant draws a bill upon a correspondent, who accepts it, this is payment: for it makes him debtor to another person; who may bring his action. 10 *Mod.* 37. See title *Bill of Exchange*.

PAYMENT INTO COURT; See *Money into Court*.

PEACE, *Pax.*] In the general signification, is opposite to war or strife: but particularly in law, it intends a quiet behaviour towards the King and his Subjects. And if any man is in danger from another, and makes oath of it before a Justice of Peace, he shall be secured by good bond, which is called binding to the Peace. *Lam. Eiren. lib.*

2. *cap.* 2. 77: *Crompt. Just. of Peace*, 118, 129. And also frank-pledge and conservation of the Peace. Time of Peace is, when the Courts of justice are open; and Judges and ministers of the same may, by law, protect men from wrong, and administer justice to all. *Co. Litt.* 249.

All authority for keeping the Peace comes originally from the King, who is the Supreme Magistrate for preservation thereof; though it is said the King cannot take a recognizance of the Peace; because it is a rule in law that no one can take any recognizance, who is not either a justice of record, or by commission: also it is certain, that no duke, earl, or baron, as such, have any greater power to keep the Peace, than mere private persons. *Lamb. lib.* 1. c. 3: *Dalt. c.* 1. But the Lord Chancellor, or Lord Keeper of the Great Seal, the Lord High Steward, the Lord Marshal, and every Justice of the King's Bench, have, as incident to their offices, a general authority to keep the Peace throughout the realm and to award process for surety of the Peace, and take recognizances for it. And every Court of Record hath power to keep the Peace within its own precinct: as have likewise Sheriffs, who are entrusted with the custody of the counties, consequently have by it an implied power of keeping the Peace within the same; and coroners may bind persons to the Peace, who make an affray in their presence; but may not grant process of the Peace, &c. 2 *Hawk. P. C.*

Peace shall be kept, and justice and right duly administered to all persons. *Stat.* 1 *R.* 2. c. 2, &c.—Breakers of the Peace to be imprisoned, and to find sureties, &c. *Stats.* 2 *Ed.* 3. c. 6: 34 *Ed.* 3. c. 1. Recognizances for keeping the Peace to be certified to the quarter sessions. *Stat.* 3 *H.* 7. c. 1.—The Chancery and King's Bench restrained from granting process of the Peace or behaviour without motion and affidavit; and to give costs and damages to persons wrongfully vexed by such process, and restrained from granting *supersedeas*, unless the process is granted in the manner required by the statute. The said Courts to punish insufficient sureties. *Stat.* 21 *Jac.* 1. c. 8. Actions against peace-officers made local. *Stat.* 21 *Jac.* 1. c. 12. And the general issue pleadable. *Stat.* 7 *Jac.* 1. c. 5: 21 *Jac.* 1. c. 12. See this Dictionary, titles *Justice of Peace*; *Surety of the Peace*; and *post*, *Peace of the King*.

PEACE OF GOD AND THE CHURCH, *Pax Dei & Ecclesie*.] Was anciently used for that cessation which the King's Subjects had from trouble and suit of law between the terms, and on *Sundays* and holidays. See *Vacation*.

PEACE OF THE KING, *Pax Regis* mentioned in *stat.* 6 *R.* 2. st. 1. c. 13.] Is that Peace and security both for life and goods, which the King promiseth to all his Subjects, or others taken into his protection. And where an outlawry is reversed, a person is restored to the King's Peace, and this is termed *ad Pacem redire*. *Bract. lib.* 3. c. 11. This point of policy seems to have been borrowed by us from the *Feudists*, which, in the second book of the *Feuds*, *cap.* 53, intituled, *de Pace tenenda*, &c. *Hotoman* proveth. Of this *Hoveden* setteth down many branches. *Annal. H.* 2. fol. 144, 330. As to the Peace of the Church, see title *Sanctuary*. The Peace of the King's highway is the immunity that the King's highway hath to be free from annoyance or molestation. The Peace of the plough whereby the plough and the plough cattle are secured from distresses. *R. N. B.* 90. And fairs

have been said to have their Peace; because no man might be troubled in them for any debt contracted elsewhere.

PECIA, A piece or small quantity of ground. *Paroch. Antiq.* 240.

PECTORALE, A word often met with in old writings. Most authors agree that it is the same with that garment called *rationale*, which the high priest in the old law wore on his shoulders, as a sign of perfection. It is worn also by the high priest of the new law, as a sign of the greatest virtue. *Quæ gratia & ratione perficitur*; for which reason it is called *rationale*. It is by some taken to be that part of the pall which covers the breast of the priest, and from thence called *Pectorale*. But all agree that it is the richest part of that garment, embroidered with gold, and adorned with precious stones. *Cowell*.

PECTORAL, Armour for the breast, a breast-plate or petral, for a horse; from the Lat. *pectus*; it is mentioned in *stat.* 13 & 14 *Car.* 2. c. 3.

PECULIAR, Fr. *peculier*, i. e. private.] A particular parish or church, that hath jurisdiction within itself, and power to grant administration or probate of wills, &c. exempt from the Ordinary.

There are Royal Peculiars, and Archbishops' Peculiars: the King's chapel is a Royal Peculiar, exempted from all spiritual jurisdiction, and reserved to the immediate government of the King: there are also some peculiar ecclesiastical jurisdictions belonging to the King, which formerly appertained to Monasteries and Religious Houses. It is an antient privilege of the See of *Canterbury*, that wherever any manors or advowsons belong to it, they forthwith become exempt from the Ordinary, and are reputed Peculiars of that see; not because they are under no Ordinary, but because they are not under the Ordinary of the diocese, &c. For the jurisdiction is annexed to the Court of Arches, and the judge thereof may originally cite to these Peculiars of the Archbishop. *Wood's Inst.* 504.

The Court of Peculiars of the Archbishop of *Canterbury*, hath a particular jurisdiction in the city of *London*, and in other dioceses, &c. within his province: in all, fifty-seven peculiars. 4 *Inst.* 338: *Stat.* 22 & 23 *Car.* 2. c. 15. There are some Peculiars which belong to Deans and Chapters, or a Prebendary, exempted from the Archdeacon only: they are derived from the Bishop of antient composition, and may be visited by the Bishop in his primary or triennial visitation: in the mean time, an Official of the Dean and Chapter, or Prebendary is the Judge; and from hence the appeal lies to the Bishop of the diocese. *Wood* 504. Appeal lieth from other Peculiar Courts to the King in Chancery. *Stat.* 25 *H.* 8. c. 19. The Dean and Chapter of *St. Paul's* have a Peculiar jurisdiction; and the Dean and Chapter of *Salisbury* have a large Peculiar within that diocese; so have the Dean and Chapter of *Litchfield*, &c. 2 *Nels. Abr.* 1240, 1241.

There is mention in our books of Peculiars of Archdeacons; but they are not properly Peculiars, only subordinate jurisdictions; and a Peculiar is *primâ facie* to be understood of him who hath a co-ordinate jurisdiction with the Bishop. *Hob.* 185: *Mod. Ca.* 308. If an Archdeacon hath a peculiar authority by commission, this shall not take away the authority of the Bishop; but, if he hath authority and jurisdiction by prescription, it is said, it shall. 2 *Roll. Rep.* 357. Where a man dies intestate, leaving goods in several Peculiars, it has been held, that the Archbishop is to grant administration. *Sid.*

90: 5 *Mod.* 239. See 16 *Vin. Abr.* title *Peculiars*; and this Dictionary, title *Courts Ecclesiastical* 4.

PECUNIA, Properly money, but antiently used for cattle, and sometimes for other goods as well as money. So we find often in *Domesday*, *Pastura ibidem ad Pecuniam villæ*, that is, pasture-ground for the cattle of the village. *Cowell*.

PECUNIA SEPULCHRALIS, *LL. Canuti*, 102.] Money antiently paid to the priest at the opening of the grave, for the good of the deceased's soul. This the Saxons called *saulscoat*, *saulscot*, and *animæ symbolum*. *Spel. de Concil.* t. 1. f. 517. See *Mortuary*.

PECUNIARY, All punishments of offences were antiently Pecuniary, by mulct, &c. See *Fine*.

PECUNIARY CAUSES, Cognizable in the *Ecclesiastical Courts*; are such as arise either from the withholding ecclesiastical dues, or the doing or neglecting some act relating to the church, whereby damage accrues to the plaintiff; towards obtaining a satisfaction for which he is permitted to institute a suit in the Spiritual Court. For the principal of these causes, see 3 *Comm.* 88; and this Dictionary, titles *Courts Ecclesiastical*; *Tithes*; *Spoliation*; *Dilapidation*.

PECUNIARY LEGACY; See titles *Executor*; *Legacy*.

PEDAGE, *pedagium*.] Money given for the passing by foot or horse through any country. *Cassan. de Cons. Burgun.* 118: *Spelm.* This word is likewise mentioned by *Mat. Paris*, anno 1256.

PEDALE, A foot cloth, or piece of tapestry laid on the ground to tread on, for greater state and ceremony. *Ingulph.* page 41.

PEDIS ABSCISSIO, Cutting off the foot; a punishment on criminals, antiently inflicted here, instead of death; as appears by the laws of William, called *The Conqueror*, cap. 7; so, in *Ingulphus*, p. 856: *Fleto*, lib. 1. c. 38: *Bracton*, lib. 3. cap. 32: *Monast.* 1 tom. page 166.

PEDLARS, See *Hawkers*.

PEDONES, Foot-soldiers. *Simeon of Durham*, anno 1085.

PEERAGE. The dignity of the Lords or Peers of the realm. See *Peers of the Realm*.

PEERS, *Peers*;] Signify, in law, those who are impanelled in an inquest upon a man, for convicting or clearing him of any offence; the reason is, because the custom of the realm is to try every man in such case by his Peers or equals. See *stats. Westm.* 1. 3 E. 1. cap. 6: *Mag. Car.* c. 29. And in this sense, it is in use with other nations. *Cowell*.

And as every one of the Nobility, being a Lord of Parliament, is a Peer, or equal to all the other Lords, though of several degrees; so the Commons are Peers to one another, although distinguished as Knights, Esquires, Gentlemen, &c. 2 *Inst.* 29: 3 *Inst.* 31. See *post*, title *Peers of the Realm*.

PEERS OF FEES. The word Peer denoted originally one of the same rank; afterwards, it was used for the vassals or tenants of the same Lord, who were obliged to serve and attend him in his Courts, being equal in function: these were termed Peers of Fees, because holding fees of the Lord; or because their business in Court was to sit and judge under their Lord, of disputes arising on fees; but if there were too many in one lordship, the Lord usually chose twelve, who had the title of Peers, by way of distinction; from whence, it is said, we derive our common juries, and other Peers. *Cowell*.

PEERS OF THE REALM.

PARES REGNI; PROCERES.] The Nobility of the Kingdom, and Lords of Parliament; who are divided into *Dukes, Marquesses, Earls, Viscounts, and Barons*. And the reason why they are called Peers is, that notwithstanding a distinction of dignities in our Nobility, yet in all public actions they are equal; as in their votes of Parliament, and trial of any nobleman. *S. P. C. lib. 3.* The appellation seems to have been borrowed from *France*, from those twelve Peers that *Charlemagne* instituted in that kingdom, called *Pares, vel Patricii Francia*.

- I. *Of the Titles and Origin of the several Degrees of Nobility.*
- II. *The Manner in which they may be created, and limited; and how forfeited.*
- III. *Of the Privileges of Peers, (and see tit. Privilege.)*
- IV. *The Mode of their Trial in capital Cases.*

I. ALL degrees of nobility and honour are derived from the King as their fountain, and he may institute what new titles he pleases. Hence it is that all degrees of nobility are not of equal antiquity.

A Duke though he be in *England*, in respect of his title of nobility, inferior in point of antiquity to many others, yet is superior to all of them in rank; his being the first title of dignity after the royal family. *Camden Britan. title Ordines.* Among the Saxons the Latin names of Dukes, *duces*, is very frequent; and signified, as among the Romans, the commanders or leaders of their armies, whom in their own language they called *heretoge*, and in the laws of *Henry I.* (as translated by *Lambard*) they are called *heretochii*. But after the Norman conquest, which changed the military polity of the nation, the Kings themselves continuing for many generations Dukes of *Normandy*, they would not honour any Subjects with the title of Duke till the time of *Edward III.*; who claiming to be King of *France*, and thereby losing the ducal in the royal dignity in the eleventh year of his reign, created his son, *Edward the Black Prince*, Duke of *Cornwall*; and many of the Royal Family especially were afterwards raised to the like honour. This reason, however, does not seem very satisfactory, as in fact this order of Nobility was created about a year before *Edw. III.* assumed the title of King of *France*, *A. D. 1337.* *Henry's Hist. Eng. viii. 135. (8vo.)* See this Dictionary, titles *Duke; King II.*

In the reign of *Queen Elizabeth*, *A. D. 1572*, the whole order became utterly extinct; (*Camden. Britan. title Ordines: Spelman. Gloss. 191;*) but it was revived about fifty years afterwards by her Successor, who was remarkably prodigal of honours, in the person of *George Villiers Duke of Buckingham. 1 Comm. c. 12.*

A Marquess, (*Marchio*), is the next degree of nobility. His office formerly was (for dignity and duty were never separated by our ancestors) to guard the frontiers and limits of the kingdom; which were called the marches from the Teutonic word, *marche*, a limit: such as, in particular, were the marches of *Wales* and *Scotland*, while each continued to be an enemy's country. The persons who had commanded there were called Lords-Marchers, or Marquesses; whose authority was abolished by *stat. 27 Hen. 8. c. 27. (26?)*, though the title had long before been made a mere ensign of honour; *Robert Vere*, Earl of *Oxford*, being created Marquis of *Dublin*, by *Richard II.* in

the 8th year of his reign. 2 *Inst.* 5. See this Dictionary, title *Marquess*.

An *Earl* is a title of nobility so antient, that its original cannot be clearly traced out. Thus much seems tolerably certain: that among the *Saxons* they were called *ealdormen*, quasi elder men, signifying the same as senior or senator among the *Romans*; and also *sciremen*, because they had each of them the civil government of a several division or shire. On the irruption of the *Danes*, they changed the names to *Eorles*, which, according to *Camden*, signified the same in their language. *Britan. tit. Ordines*. In *Latin* they are called *Comites*, (a title first used in the Empire,) from being the King's attendants; à *societate nomen sumfiserunt, Reges enim tales sibi associant*. *Bracton, lib. 1. c. 8: Flet. l. 1. c. 5*. After the *Norman* conquest, they were for some time called Counts or Countees, from the *French*; but they did not long retain that name themselves, though their shires are from thence called counties to this day. The name of *Earls* or *Comites* is now become a mere title; they having nothing to do with the government of the county, which is now entirely devolved on the Sheriff, the Earl's deputy or *vice-comes*. In writs and commissions, and other formal instruments, the King, when he mentions any Peer of the degree of an Earl, usually stiles him, "trusty and well-beloved cousin;" an appellation as antient as the reign of *Henry IV.*: who, being either by his wife, his mother, or his sisters, actually related or allied to every Earl then in the kingdom, artfully and constantly acknowledged that connection in all his letters and other public acts: from whence the usage has descended to his successors, though the reason has long ago failed. See title *Earl*.

The name of *vice-comes*, or *Viscount*, was afterwards made use of as an arbitrary title of honour, without any shadow of office pertaining to it, by *Henry VI.*; when in the eighteenth year of his reign, he created *John Beaumont*, a Peer, by the name of Viscount *Beaumont*; which was the first instance of the kind. 2 *Inst.* 5. (See *Barrington* on the Antient Statutes, 409, 410.)

The title of *Baron* is the most general and universal title of nobility; for originally every one of the Peers of superior rank had also a barony annexed to his other titles. 2 *Inst.* 5, 6. But it hath sometimes happened that, when an antient baron hath been raised to a new degree of peerage, in the course of a few generations, the two titles have descended differently; one perhaps to the male descendants, the other to the heirs-general; whereby the earldom, or other superior title, hath subsisted without a barony; and there are also modern instances, where Earls and Viscounts have been created without annexing a barony to their other honours: so that now the rule doth not hold universally, that all Peers are Barons. The original and antiquity of baronies have occasioned great inquiries among our English antiquaries. The most probable opinion seems to be, that they were the same with our present lords of manors; to which the name of Court-baron (which is the Lord's Court, and incident to every manor) gives some countenance. It may be collected from King *John's Magna Carta, c. 14*, that originally all lords of manors, or Barons, that held of the King *in capite* had seats in the Great Council of Parliament: till, about the reign of that Prince, the conflux of them became so large and troublesome, that the King was obliged to divide them, and summon only the greater Barons in person; leaving the small

ones to be summoned by the Sheriff; and (as it is said) to sit by representation in another House; which gave rise to the separation of the two Houses of Parliament. *Gilb. Hist. of Exch. c. 3: Seld. Title of Hon. 2. 5. 21.* See title *Parliament*. By degrees the title came to be confined to the greater Barons, or Lords of Parliament only; and there were no other Barons among the peerage but such as were summoned by writ, in respect of the tenure of their lands or baronies, till *Richard I.* first made it a mere title of honour, by conferring it on divers persons by his letters patent. 1 *Inst* 9: *Seld. Jan. Angl. 2* § 66.

Before the time of King *Ed. III.* there were but two titles of nobility, viz. Earls and Barons: the Barons were originally by tenure, afterwards created by writ, and after that by patent; but Earls were always created by letters patent. *Seld. 536.* See 1 *Comm. c. 12. p. 398. in n.* And *Hen. VI.* created *Edmund of Hadham*, Earl of *Richmond*, by patent, and granted him precedence before all other Earls. *Mary I.* likewise granted to *Henry Ratcliff*, Earl of *Sussex*, a privilege by patent beyond any other nobleman, viz. that he might at any time be covered in her presence, like unto the grandees of *Spain*; and some few others of our Nobility have had this honour. *Dict.*

The *stat. 31 Hen. 8. c. 10.* settles the precedence of the Lords of Parliament, and great Officers of State: after whom, the Dukes, Marquesses, Earls, Viscounts, and Barons, take place according to their antienty; but it is declared, that precedence is in the King's disposition. See this Dictionary, title *Precedence*.

A dignity of Earl, &c. is a title by the Common Law; and if a patentee be disturbed of his dignity, the regular course is to petition the King, who indorses it, and sends it into Chancery. *Staundf. Prærog. 72: 22 Edw. 3.*

There are now no feudal baronies; but there are Barons by succession, and those are the Bishops; who, by virtue of antient baronies held of the King, (into which the possessions of their bishoprics have been converted,) are called by writ to Parliament, and have place in the House of Peers as Lords Spiritual: the temporal possessions of Bishops are held by their service to attend in Parliament when called; and that is in the nature of a barony. See *post. II. III.*

II. THE right of Peerage seems to have been originally territorial; that is, annexed to lands, honours, castles, manors, and the like; the proprietors and possessors of which were (in right of those estates) allowed to be Peers of the Realm, and were summoned to Parliament to do suit and service to their Sovereign; and, when the land was alienated, the dignity passed with it as appendant. Thus the Bishops still sit in the House of Lords in right of successions to certain antient baronies annexed, or supposed to be annexed, to their episcopal lands. *Glan. l. 7. c. 1.* And thus, in 11 *Hen. 6.* the possession of the castle of *Arun- del* was adjudged to confer an earldom on its possessor. *Seld. Tit. of Hon. b. 2. c. 9. § 5.* Afterwards, when alienations grew to be frequent, the dignity of peerage was confined to the lineage of the party ennobled; and, instead of territorial, became personal. Actual proof of a tenure by barony became no longer necessary to constitute a Lord of Parliament; but the record of the writ of summons to him, or his ancestors, was admitted as a sufficient evidence of the tenure. 1 *Comm. c. 12.* The estates and dignities attached to the castle of *Arun- del* are now inalienably vested in the family of the Duke of *Norfolk*;

see private acts, 3 *Car.* 1. c. 4: 37 *Geo.* 3. c. 40: 41 *Geo.* 3. (*U. K.*) c. xv.

Peers are now created either by writ, or by patent; for those who claim by prescription must suppose either a writ or patent made to their ancestors; though, by length of time, it is lost. The creation by writ, or the King's letter, is a summons to attend the House of Peers, by the style and title of that barony, which the King is pleased to confer; that by patent is a royal grant to a Subject of any dignity and degree of peerage. The creation by writ is the more antient way; but a man is not ennobled thereby, unless he actually takes his seat in the House of Lords: and some are of opinion that there must be at least two writs of summons, and a sitting in two distinct Parliaments, to evidence an hereditary barony. *Whitlocke of Parl.* ch. 114. The most usual way, therefore, because the surest, is to grant the dignity by patent; which enures to a man and his heirs according to the limitations thereof, though he never himself makes use of it. *Co. Litt.* 16. Yet it is frequent to call up the eldest son of a Peer to the House of Lords by writ of summons, in the name of his father's barony: because in that case there is no danger of his children's losing the nobility, in case he never takes his seat; for they will succeed to their grandfather. And where the father's barony is limited by patent to him, and the heirs-male of his body, and his eldest son is called up to the House of Lords by writ, with the title of this barony, the writ in this case will not create a fee or a general estate tail, so as to make a female capable of inheriting the title; but upon the death of the father the two titles unite, or become one and the same. *Ex parte Eliz. Perry, Bro. P. C.* Creation by writ has also one advantage over that by patent: for a person created by writ holds the dignity [in tail] to him and his heirs, without any words to that purport in the writ; but in letters patent there must be words to direct the inheritance, else the dignity enures only to the grantee for life. *Co. Litt.* 9. 16. For a man or woman may be created noble for their own lives, and the dignity not descend to their heirs at all, or descend only to some particular heirs: as where a peerage is limited to a man, and the heirs male of his body, by *Elizabeth* his present lady; and not to such heirs by any former or future wife. And it is to be observed, that though the opinion of Lord *Coke* is to the contrary, it is now understood, that a creation by writ does not confer a fee-simple in the title, but only an estate-tail-general: for every claimant of the title must be descended from the person first ennobled. 1 *Woodd.* 37: 1 *Comm. c.* 12, & n.

In case of creation by patent, the person created must have the inheritance limited by apt words; as to him and his heirs, or the heirs male of his body, heirs of his body, &c. otherwise he shall have no inheritance. 2 *Inst.* 48.

The King may create either man or woman noble for life only: and peerage may be gained for life, by act of law; as if a Duke take a wife, she is a Dutchess in law by the intermarriage; so of a Marquess, Earl, &c. 1 *Inst.* 16: 9 *Rep.* 97. Also the dignity of an Earl may descend to a daughter, if there be no son, who shall be a Countess; and if there are many daughters, it is said, the King shall dispose of the dignity to which daughter he pleases. 1 *Inst.* 165: *Woodd.* 42. See titles *Peeress*; *Descent* III. If a person is summoned as a Baron to Parliament by writ, and, sitting, die, leaving two or

more daughters, who all dying, one of them only leaves issue a son, such issue has a right to demand a seat in the House of Peers. *Skin.* 441.

Thomas de la Warre was summoned to Parliament by writ, *anno* 3 *Hen.* 8; and *William* his son, *anno* 3 *Edw.* 6. was disabled by attainder to claim any dignity during his life, but was afterwards called to Parliament by Queen *Elizabeth*, and sat there as Puisne Lord, and died; then *Thomas*, the son of the said *William*, petitioned the Queen in Parliament to be restored to the place of *Thomas* his grandfather; and all the Judges, to whom it was referred, were of opinion that he should; because his father's disability was not absolute by attainder, but only personal and temporary, during his life: and the acceptance of the new dignity by the petitioner shall not hurt him; so that when the old and new dignity are in one person, the old shall be preferred. 11 *Rep.* 1.

Where nobility is gained by writ, or patent, without descent, it is triable by record; but when it is gained by matter of fact, as by marriage, or where descents are pleaded, nobility is triable *per pais*. 22 *Assis.* 24: 3 *Salk.* 243. A person petitioned the Lords in Parliament to be tried by his Peers; the Lords disallowed his peerage, and dismissed the petition: and it was held in this case, that the defendant's right stood upon his letters-patent, which could not be cancelled but by *scire facias*: and that the Parliament could not give judgment in a thing which did not come in a judicial way before that Court. 2 *Salk.* 510, 511: 3 *Salk.* 245. Where peerage is claimed *ratione Baronii*, as by a Bishop, he must plead that he is *unus parium Regni Angliæ*; but if the claim is *ratione nobilitatis*, he need not plead otherwise than pursuant to his creation. 4 *Inst.* 15: 3 *Salk.* 243.

When a Lord is newly created, he is introduced into the House of Peers, by two Lords of the same rank in their robes, Garter King at Arms going before, and his Lordship is to present his writ of summons, &c. to the Lord Chancellor; which being read, he is conducted to his place; and Lords by descent, where nobility comes down from the ancestors, and is enjoyed by right of blood, are introduced with the same ceremony, the presenting of the writ excepted. *Lex Constitutionis* 79.

A Nobleman, whether native or foreigner, who has his nobility from a foreign state, although the title of dignity be given him, (as the highest and lowest degrees of nobility are universally acknowledged,) in all our legal proceedings no notice is taken of his nobility; for he is no Peer: and the laws of *England* prohibit all Subjects to receive any hereditary title of honour or dignity, from any foreign Prince, without consent of the Sovereign. *Lex Constitutionis* 80, 81.

An Earldom consists in office, for defence of the kingdom; and of rents and possessions, &c. and may be entailed as any other office may, and as it concerns land: but the dignity of peerage cannot be transferred by fine; because it is a quality affixed to the blood, and so merely personal, that a fine cannot touch it. 2 *Salk.* 509: 3 *Salk.* 244.

A Peer cannot lose his nobility, but by death or attainder; though there was an instance in the reign of *Edw.* IV. of the degradation of *George Neville* Duke of *Bedford* by act of Parliament, on account of his poverty, which rendered him unable to support his dignity. 4 *Inst.* 355. But this is a singular instance: which serves at the same time, by having happened, to shew the power of Parliament; and, by hav-

ing happened but once, to shew how tender the Parliament hath been, in exerting so high a power. It hath been said indeed, that if a Baron wastes his estate, so that he is not able to support the degree, the King may degrade him; but it is expressly held by later authorities, that a Peer cannot be degraded but by act of Parliament. *Moor* 678: 12 *Rep.* 107: 12 *Mod.* 56.

George Neville Duke of Bedford was degraded by act of Parliament, 16 *June*, 17 *Ed.* 4. The preamble of the statute, reciting, that the said *George* hath not, nor may have, any livelihood to support his name, estate, and dignity, or any name of estate; and that it is oftentimes seen when a lord is called to high estate, and hath not convenient livelihood to support the dignity, it induceth great poverty, and often causeth great extortion, embracery, and maintenance, to the great trouble of all such counties where such estate shall happen to be: wherefore the King, by advice of his Lords and Commons, ordaineth, establisheth, and enacteth, That from henceforth the same creation and making of the said Duke, and all the names of dignity given to the said *George*, or to *John Neville* his father, be from henceforth void and of none effect, &c.

In which act these things are to be observed: First, that although the Duke had not any possessions to support his dignity; yet his dignity could not be taken from him without an act of Parliament. Secondly, The inconveniences appear, where a great state and dignity is, and no livelihood to maintain it. Thirdly, It is a good reason to take away such dignity by act of Parliament; therefore the statute *de absentibus* made at a Parliament holden at *Dublin* in *Ireland*, the 10th of *May*, 28 *H.* 8. by reason of the long absence of *George Earl of Shrewsbury* out of that realm, shall be expounded, according to the general words of the writ, to take away such inconvenience. 12 *Rep.* 106, 107. *Earl of Shrewsbury's* case.

Though dignities of peerage are granted from the Crown; yet they cannot be surrendered to the Crown, except it be, in order to new and greater honours; nor are they transferable, unless they relate to an office: and notwithstanding there are instances of earldoms being transferred, and wherein one branch of a family sat in the House of Peers, by virtue of a grant from the other branch, particularly in the reigns of *Hen.* III. and *Ed.* II. these precedents have been disallowed. *Lex Constitutionis* 85, 86, 87. And it seems now to be settled that a peerage cannot be transferred (unless we consider the summoning of the eldest son of a Peer by writ as a transfer of one of his father's baronies) without the concurrence of Parliament: at least in those cases where the noble personage has no barony to remain in himself: as otherwise on the transfer he would himself be deprived of his peerage, and be made ignoble by his own act. It is a maxim that the whole nation is interested in each individual Peer, and that a Peer cannot be deprived of his peerage but by act of Parliament. See *Watkins's Notes on Gilbert's Tenures*, note xi. on *p.* 11. and *p.* 361.

A personal honour or dignity may be forfeited, on committing treason, &c. for it is implied by a condition in law, that the person dignified shall be loyal; and the office of an Earl, &c. is *ad consulendum Regem tempore pacis & defendendum tempore belli*, therefore he forfeits it when he takes counsel or arms against the King. 7 *Rep.* 33.

With respect to the limitation of the number of the Peers of *Ireland*, see this Dict. titles *Ireland*; *Parliament*.

III. OF the Privileges of Peers as Members of the Upper House of Parliament, see this Dictionary, title *Parliament*.

All Peers of the realm are also looked upon as the King's hereditary counsellors, and may be called together by the King to impart their advice in all matters of importance to the realm, either in time of Parliament, or, which hath been their principal use, when there is no Parliament in being. *Co. Litt.* 110.

Instances of conventions of the Peers, to advise the King, have been in former times very frequent, though now fallen into disuse, by reason of the more regular meetings of Parliament. Many instances of this kind of meeting are to be found under our antient Kings: though the former method of convoking them had been so long left off, that when *Charles I.* in 1640, issued out writs under the Great Seal to call a great council of all the Peers of *England*, to meet and attend his Majesty at *York*, previous to the meeting of the Long Parliament, the Earl of *Clarendon* mentions it as a new invention, not before heard of; that is, as he explains himself, so old, that it had not been practised in some hundreds of years. But, though there had not so long before been an instance, nor has there been any since, of assembling them in so solemn a manner, yet in cases of emergency, our princes have at several times thought proper to call for and consult as many of the nobility as could easily be got together; as was particularly the case with King *James the Second*, after the landing of the Prince of *Orange*, and with the Prince of *Orange* himself, before he called that Convention-parliament, which afterwards called him to the throne. 1 *Comm.*

Besides this general meeting, it is usually looked upon to be the right of each particular Peer of the realm, to demand an audience of the King, and to lay before him, with decency and respect, such matters as he shall judge of importance to the public. And therefore in the reign of *Edw. II.* it was made an article of impeachment in Parliament against the two *Hugh Spencers*, (father and son,) for which they were banished the kingdom, "that they by their evil covin would not suffer the great men of the realm, the King's good Counsellors, to speak with the King, or to come near him; but only in the presence and hearing of the said *Hugh* the father, and *Hugh* the son, or one of them, and at their will, and according to such things as pleased them." 4 *Inst.* 53. See 1 *Comm.* 227—9.

We are next to consider the general privileges which attach to the persons of Peers in their individual capacity.

Peers are created for two reasons; 1st. *ad consulendum*, 2d, *ad defendendum Regem*; for which reasons the law gives them certain great and high privileges, such as freedom from arrests, &c. even when no Parliament is sitting; because the law intends, that they are always assisting the King with their counsel for the commonwealth; or keeping the realm in safety by their prowess and valour. 1 *Comm.* 227.

In certain criminal cases, that is to say, on indictments for treason and felony, and misprision thereof, a nobleman shall be tried by his Peers; but in all misdemeanors, as libels, riots, perjuries, conspiracies, &c. he is to be tried, like a commoner by a jury. 3 *Inst.* 30: 2 *Hawk. P. C. c.* 44. § 13. So in case of an appeal of felony he shall be

tried by a jury. 9 *Repl.* 30: 2 *Inst.* 49: 10 *E.* 4. 6. b: 3 *Inst.* 30. And the indictments of Peers for treason or felony, are to be formed by freeholders of the county: and then the Peers shall plead before the Lord High Steward, &c. 1 *Inst.* 156: 3 *Inst.* 28. See *post* IV.

The privilege of Peers extends only to the Peers of *Great Britain*; so that a Nobleman of any other country, or a Lord of *Ireland*, hath not any other privileges in this kingdom than a common person: also the son and heir apparent of a Nobleman is not entitled to the privilege of being tried by his Peers, which is confined to such person as is a *Lord of Parliament* at the time; but it seems that an infant Peer is privileged from arrests, his person being held sacred. *Co. Litt.* 156: 2 *Inst.* 48: 3 *Inst.* 30. See titles *Arrest*; *Privilege*; *Process*.

The Peers of *Scotland* or *Ireland* had no privilege in this kingdom before the Union: but by clauses in the respective articles of Union, the elected Peers have all the privileges of Peers of Parliament; also all the rest of the Peers of *Scotland* and *Ireland* have all the privileges of the peerage of *England*, excepting only that of sitting and voting in Parliament. See titles *Scotland*: *Ireland*: *Parliament*.

A *Roman Catholic* Peer is not entitled to the privilege of franking letters. 2 *Bos.* and *Pul.* 139.

The right of trial by their Peers, it seems now generally admitted, does not extend to Bishops: though the reason given for this exception, *viz.* that they are not ennobled in blood, and consequently not Peers with the nobility, does not seem sufficiently satisfactory. And it has been suggested, that if any instances of trials of this sort by a Jury had occurred in remote times, the Bishops could not have demanded a trial in Parliament, without admitting themselves subject to temporal jurisdiction; from which they then claimed exemption: and hence it may be conjectured the Bishops have lost their right to be tried in Parliament, though only two instances can be found of their being tried by Jury, *viz.* those of Archbishop *Cranmer* and Bishop *Fisher*. 2 *Hawk. P. C. c.* 44. § 12.

Some Bishops have been tried by Peers of the Realm; but it hath been when impeached by the House of Commons, as upon special occasions many others have been who have not been Peers. The Bishops may however claim all the privileges of the Lords Temporal; except that they cannot be tried by their Peers, and that they cannot, in capital cases, pass upon the trial of any other Peers, they being prohibited by canon to be judges of life and death, &c. They usually therefore withdraw voluntarily, but enter a protest, declaring their right to stay. See further, title *Bishops*, and 4 *Comm. c.* 19.

A Peer, or Peeress (either in her own right or by marriage,) cannot be arrested in civil cases. *Finch. L.* 355: 1 *Ventr.* 298. They have also many peculiar privileges annexed to their peerage in the course of judicial proceedings. A Peer, sitting in judgment, gives not his verdict upon oath, like an ordinary jurymen, but upon his honour. 2 *Inst.* 49. He answers also to bills in Chancery upon his honour, and not upon his oath; 1 *P. Wms.* 146; but, when he is examined as a witness either in civil or criminal cases, or on Interrogatories in Chancery, he must be sworn, (whether in inferior Courts, or in the High Court of Parliament); for the respect which the law shews to the honour of a Peer, does not extend so far as to overturn a settled maxim, that *in judicio non creditur nisi juratis*. *Salk.* 512:

Cro. Car. 64. The honour of Peers is however so highly tendered by the law, that it is much more penal to spread false reports of them and certain other great officers of the realm, than of other men: scandal against them being called by the peculiar name of *scandalum magnatum*, and subjected to peculiar punishments by divers antient statutes. *Stats. West.* 1. 3 *Edw.* 1. c. 34: 2 *Ric.* 2. st. 1. c. 5: 12 *Ric.* 2. c. 11. See titles *Scandalum Magnatum*; *Libel*; *Privilege*.

As to the privileges of Peers in cases of actions against them, see this Dictionary, title *Parliament*.

With respect to the privileges of Peeresses, see *post*, title *Peeresses*.

As to the general privileges of Peers, something more at length, and in various instances, see further this Dictionary, title *Privilege*.

At Common Law, it was lawful for any Peer to retain as many chaplains as he would; but by *stat.* 21 *H.* 8. c. 13. their number is limited. See title *Chaplains*. In many cases, the protestation of honour shall be sufficient for a Peer; as in trial of Peers, they proceed upon their honour, not upon oath; and if a Peer is defendant in a court of Equity, he shall put in his answer upon his honour, (though formerly it was to be on oath): and in action of debt upon account the plaintiff being a Peer, it shall suffice to examine his attorney, and not himself on oath; but where a Peer is to answer interrogatories, or make an affidavit, as well as where he is to be examined as a witness, he must be upon his oath. *Bract. lib.* 5. c. 9: 9 *Rep.* 49: 3 *Inst.* 29: *W. Jones*, 152: 2 *Salk.* 512.

In the pleas of Parliament, 18 *Ed.* 1. between the Earl of Gloucester and Earl of Hereford, on long debate whether *John D. Hastings*, a baron, ought to be sworn, because he was a Peer of the Realm, it was resolved that he ought to lay his hand on the book. The like was resolved, 10 *Car.* in *B. R.* by the Court, where the Lord Dorset's testimony was requisite. See *Dy.* 314. *b. marg. fil.* 98.

A bill was against a Peeress to discover deeds, she answers on her honour and confesses deeds. She shall produce them only upon her honour, and not on oath. *Ch. Prec.* 92.

A *subpœna* shall not be awarded against a Peer out of the Chancery, in a cause; but a letter from the Lord Chancellor, or Lord Keeper, in lieu thereof. See title *Chancery*. A Peer may not be impanelled upon any inquest, though the cause hath relation to two Peers; and if a Peer be returned on a Jury, a special writ shall issue for his discharge from service. The houses of Peers shall not be searched for conventicles, but by warrant under the sign manual, or in the presence of the Lord Lieutenant, or one Deputy Lieutenant, and two Justices of the peace. *Stat.* 22 *Car.* 2. c. 1: and it is expressly provided by *stat.* 13 & 14 *Car.* 2. c. 1. against non-conformists, that for every third offence, which is punishable by transportation, Lords of Parliament shall be tried by their Peers.

A nobleman menacing another person, whereby such other person fears his life is in danger, no writ of *supplicavit* shall issue, but a *subpœna*; and when the Lord appears, instead of surety, he shall only promise to keep the peace. 35 *H.* 6. See title *Surety of the Peace*.

The privilege of a Peer is so great in respect of his person, that the King may not restrain him of his liberty, without order of the House of Lords, except it be in cases of treason, &c. A memorable

case wherein was that of the Earl of *Arundel* imprisoned by the King in the reign of King *Charles I.*

Every Lord of Parliament is allowed his clergy in all cases, where others are excluded by the *stat. 1 Ed. 6. c. 12.* except wilful murder; and cannot be denied clergy for any other felony wherein it was grantable at Common Law, if it be not ousted by some statute made since the first of King *Ed. 6. S. P. C. 130.* Lord *Morley*, who was tried by his Peers for murder, and found guilty of manslaughter, was discharged without clergy. *Sid. 277: 2 Nels. Abr. 1181.* See title *Clergy, Benefit of.*

In ejectment a special verdict was found on a trial at bar, and judgment for defendant, and costs taxed; and after affidavit of the demand of costs, a motion was made for an attachment against the Duchess (the Duke being dead), she being one of the lessors, for non-payment of costs; and it was alleged, that if the Court did not grant it, the defendant would be remediless; for though in other cases a *distringas* issues against Peers, yet in this case no process can go but an attachment. The Court refused to grant an attachment against the person of the Duchess, but ordered her to shew cause why an attachment, as to her goods and chattels, should not be issued; which rule was afterwards made absolute. *Rep. of Pract. in C. B. 7, 8.* See title *Attachment.*

A Peer, or Lord of Parliament, cannot be an approver; for it is against *Magna Carta* for him to pray a coroner. *3 Inst. 129. c. 56: 2 Hawk. Pl. C. c. 24. § 3.*

If a bill in Chancery be exhibited against a Peer, the course is first for the Lord Keeper to write a letter to him; and if he doth not answer, then a *subpoena*; then an order to shew cause why a sequestration should not go; and if he still stands out, then a sequestration. And the reason is, because there can be no process of contempt against his person. *2 Vent. 342.* See title *Chancery; Privilege.*

Distringas is the first process against a Peer on an information for an intrusion on the King's lands, or for a conversion of the King's goods. *2 Hawk. Pl. C. c. 27. § 12.* cites *Co. Ent. 387.*

If a Peer be impleaded by a Commoner, yet such cause shall not be tried by Peers, but by a Jury of the country; for though the Peers are the proper *fares* to a Lord of Parliament in capital matters, where the life and nobility of a Peer is concerned; yet in matter of property *the trial of fact is not by them*, but by the inhabitants of those counties where the facts arise; since such Peers living through the whole kingdom, could not be generally cognizant of facts arising in several counties, as the inhabitants themselves where they are done; but this want of having Noblemen for their Jury was compensated as much as possible, by returning persons of the best quality; therefore it was formerly necessary, that a Knight should be summoned in any cause where a Peer was party. *G. Hist. C. B. 78, 79.* See title *Jury.*

IV. BLACKSTONE says, that in the method and regulations of its proceedings, the trial by the House of Peers differs but little from the trial *per patriam*, or by Jury; except that no special verdict can be given in the trial of a Peer; because the Lords of Parliament, or the Lord High Steward, (if the trial be had in his Court,) are Judges sufficiently competent of the law that may arise from the fact. *Hutt. 116.* And except also, that the Peers need not all agree in their verdict,

but the greater number, consisting of twelve at the least, will conclude and bind the minority. *Kelynge* 56: *Stat. 7 W. 3. c. 3. § 10: Foster* 247. During a trial before the House of Peers in Parliament, every Peer present on the trial is to judge both of the law and the fact. *Fost.* 142. In cases of the impeachment of a Peer for treason, a Lord High Steward is usually, though not necessarily appointed, rather in the nature of a Speaker to regulate the proceedings than as a Judge. 4 *Comm.* 260: *Fost.* 145. But in the Court of the High Steward, which is held in the recess of Parliament, he alone is to judge in all points of law and practice, and the Peers-triers are merely judges of the fact. *Fost.* 142.

All the Barons of Parliament shall be tried for treason, felony, misprision, or as accessory, at the suit of the King by their Peers. See *Magna Carta*, 9 *H. 3.* 29: 2 *Inst.* 49: 9 *Co.* 30. *b:* *Sta.* 152, 153. So all the nobility who are Peers of Parliament, by the Common Law, which is now affirmed by the *stat.* 20 *H. 6. c. 9.* And a Peer cannot waive the trial by his Peers. *Kel.* 56, *in marg.* 621. 1 *St. Tr.* 265: 2 *Rush.* 94.

It has been adjudged, that if a Peer on arraignment before the Lords, refuse to put himself on his Peers, he shall be dealt with as one who stands mute; for it is as much the law of the land, that a Peer be tried by his Peers, as a Commoner by Commoners; yet if one who has a title to peerage be indicted and arraigned as a Commoner, and plead not guilty, and put himself upon his country, it hath been adjudged that he cannot afterwards suggest that he is a Peer, and pray trial by his Peers. 2 *Hawk. Pl. C. c.* 44. § 19.

By *stat. 7 W. 3. cap. 3. § 10.* it is enacted, That upon the trial of any Peers or Peeresses, for treason or misprision, all the Peers who have a right to sit and vote in Parliament, shall be duly summoned twenty days at least before the trial, and every Peer so summoned and appearing shall vote in the trial, first taking the oaths of allegiance and supremacy, and subscribing and repeating the test enjoined by 30 *Car. 2. st. 2. c. 1.*—Formerly, Lords-triers were appointed by the Crown in the trial of Peers; but this was at length found such an inlet to oppression, as to be deservedly abolished by the above *stat. 7 W. 3.* See title *Treason.* And it seems, that this act extends to every proceeding in full Parliament, for the trial of a Peer in the ordinary course of justice. *Fost.* 247.

By *stat. 6 Ann. c. 23. § 12.* Peers shall be indicted in Scotland as in England.

The Peer being indicted for the treason or felony, before commissioners of oyer and terminer, (or in the King's Bench, if the treason, &c. be committed in the county of *Middlesex.*) then the King by commission under the Great Seal, constitutes some Peer (generally the Lord Chancellor) Lord High Steward, who is Judge in these cases; and the commission commands the Peers of the Realm to be attendant on him, also the Lieutenant of the *Tower*, with the prisoner, &c. A *certiorari* is awarded out of Chancery, to remove the indictment before the Lord High Steward: and another writ issues to the Lieutenant of the *Tower*, for bringing the prisoner; and the Lord High Steward makes his precepts for that purpose, assigning a day and place, as in *Westminster-Hall*, inclosed with scaffolds, &c. and for summoning the Peers, which are to be twelve and above, at least, present: at the day, the Lord High Steward takes place under a cloth

of State; his commission is read by the clerk of the Crown, and he has a white rod delivered him by the usher; which being returned, proclamation is made, and command given for certifying of indictments, &c. and the Lieutenant of the *Tower* to return his writ, and bring the prisoner to the bar; after this, the serjeant at arms returns his precept with the names of the Peers summoned, and they are called over, and, answering to their names, are recorded, when they take their places: the ceremony thus adjusted, the High Steward declares to the prisoner at the bar, the cause of their assembly, assures him of justice, and encourages him to answer without fear; then the clerk of the Crown reads the indictment, and arraigns the prisoner, but is not to insist on his holding up his hand, and the High Steward gives his charge to the Peers; this being over, the King's counsel produce their evidence for the King; and if the prisoner hath any matter of law to plead, he shall be assigned counsel; after evidence given for the King, and the prisoner's answer heard, the prisoner is withdrawn from the bar, and the Lords go to some place to consider of their evidence: but the Lords can admit no evidence, but in the hearing of the prisoner; they cannot have conference with the judges, or demand it, (who attend on the Lord High Steward, and are not to deliver their opinions beforehand,) but in the prisoner's hearing; nor can they send for the opinions of the judges, or demand it, but in open Court: and the Lord Steward cannot collect the evidence, or confer with the Lords, but in the presence of the prisoner; who is at first to require justice of the Lords, and that no question or conference be had, but in his presence. Nothing is done in the absence of the prisoner, until the Lords come to agree on their verdict; and then they are to be together as Juries until they are agreed, when they come again into Court and take their places; and the Lord High Steward, publicly in open Court, demands of the Lords, beginning with the puisne Lord, whether the prisoner, calling him by his name, be guilty of the treason, &c. whereof he is arraigned; who all give in their verdict; and he being found guilty by a majority of votes, such majority being more than twelve, is brought to the bar again, and the Lord Steward acquainting the prisoner with the verdict of his Peers, passes sentence and judgment accordingly; after which an *O Yes!* is made for dissolving the commission, and the white rod is broken by the Lord High Steward; whereupon this grand assembly breaks up, which is esteemed the most solemn and august Court of Justice upon earth. 2 *Hawk. P. C. c.* 44: and see 4 *Comm. c.* 19.

The Lord High Steward gives no vote himself on a trial by commission; but only on a trial by the House of Peers, while the Parliament is sitting: where a Peer is tried by the House of Lords in full Parliament, the House may be adjourned as often as there is occasion, and the evidence taken by parcels; and it hath been adjudged that where the trial is by commission, the Lord Steward, after a verdict given, may take time to advise upon it, and his office continues till he gives judgment. But the triers may not separate upon a trial by commission, after evidence given for the King; and it hath been resolved, that the Peers in such case must continue together, till they agree, to give a verdict. *State Trials*, ii. 702: iii. 657: and see more fully, 2 *Hawk. P. C. c.* 44. § 1—8.

It is said a writ of error lies in the King's Bench of an attainder of a Peer before the Lord High Steward. 2 *Hawk. P. C. c.* 50. § 16,

cites 1 *Sid.* 208. If a Peer be attainted of treason or felony, he may be brought before the Court of *B. R.* and demanded, what he has to say why execution should not be awarded against him? And if he plead any matter to such demand, his plea shall be heard, and execution ordered by the Court, upon its being adjudged against him. 1 *H. 7.* 22. *pl.* 15: *Bro. Coro.* 129: *Fitz. Coro.* 49. Likewise the Court of King's Bench may allow a pardon pleaded by a Peer to an indictment in that Court; to save the trouble of summoning the Peers, merely for that purpose: But that Court cannot receive his plea of not guilty, &c. but only the Lord Steward on arraignment before the Lords. 2 *Inst.* 42.

The sentence against a Peer for treason, is the same as against a common Subject; though the King generally pardons all but beheading, which is a part of the judgment; for other capital crimes, beheading is also the general punishment of a Peer; but *anno* 33 *H.* 8, the Lord *Dacres* was attainted of murder, and had judgment to be hanged; and *anno* 3 & 4 *P. & M.* the Lord *Stourton*, being attainted of murder, had judgment against him to be hanged, which sentences were executed; and so in the case of Lord *Ferrers*, 10 *St. Tr.* 478. In this latter case it was determined by all the Judges, that a Peer, convicted of felony and murder, ought to receive judgment for the same, according to the provisions of *stat.* 25 *Geo.* 2. *c.* 37. See title *Homicide* III. 3. *ad. fin.* And secondly, Supposing the day appointed by the judgment for execution should lapse before such execution done, that a new time may be appointed for the execution; either by the High Court of Parliament, before which such Peer shall have been attainted, although the office of High Steward be determined; or by the Court of K. B. the Parliament not then sitting; and the record of the attainder being properly removed into that Court. *Fost.* 139.

If execution be not done, the Lord Steward may by precept command it to be done according to the judgment. 3 *Inst.* 31.

Trial by Peers is very antient: In the reign of *Will. I.* the Earl of *Hereford*, for conspiring to receive the *Danes* into *England*, and depose the conqueror, was tried by his Peers, and found guilty of treason, *per judicium parium suorum.* 2 *Inst.* 50. The Duke of *Suffolk*, *anno* 28 *H.* 6. being accused of high treason by the Commons, put himself upon the King's grace, and not upon his Peers, and the King alone adjudged him to banishment; but he sent for the Lord Chancellor, and the Lords who were in town, to his palace at *Westminster*, and also the Duke, and commanded him to quit the kingdom in their presence: The Lords nevertheless entered a protest to save the privilege of their peerage; and this was deemed no legal banishment, for the King's judging in that manner was no judgment; he was extrajudicially bid to absent himself out of the realm; and in doing it, he was taken on the sea and slain. The case of the Lord *Cromwell*, in the reign of King *Henry VIII.* was very extraordinary; this Lord was attainted in Parliament, and condemned and executed for high treason, without being allowed to make any defence. It need only be observed, that this attainder was by a Parliament under the power and influence of *Henry VIII.* See *Parliament. Hist.* 3 *V.* 163. And several great persons during this reign were brought to trial before Lords Commissioners. *Anno* 32 *Car.* 2. the Lord *Stafford* was tried for treason; and after evidence given for the King, and the prisoner had made his objections to the King's evidence, he insisted upon several points

of law, *viz.* That no overt-act was alleged in his impeachment; that they were not competent witnesses who swore against him, but that they swore for money; and whether a man could be condemned for treason by one witness, there not being two witnesses to any one point, &c. But the points insisted upon being over-ruled, he was found guilty by a majority of twenty-four votes; fifty-five against thirty-one for him. 3 *St. Tr.* 311. He was executed; but in 1685 the attainder was reversed by an act of Parliament, reciting, that he was innocent of the treason laid to his charge, and that the testimony whereon he was found guilty was false.

PEERESS. As we have noblemen, so we have noblewomen, and these may be by creation, descent, or marriage. And first, *Hen. VIII.* made *Anne Bullen* Marchioness of *Pembroke*. *James I.* created *Lady Compton*, wife to *Sir Thomas Compton*, Countess of *Buckingham* in the life time of her husband, without any addition of honour to him; and also made *Lady Finch* Viscountess of *Maidstone*, and afterwards Countess of *Winchelsea*, to her and the heirs of her body. *George I.* made *Lady Sculkingburgh* Duchess of *Kendal*. If any *English* woman takes to husband a *French* nobleman, she shall not bear the title of dignity; and if a *German* woman, &c. marry a nobleman of *England*, unless she be made denizen, she cannot claim the title of her husband, no more than her dower, &c. *Lex Constitution.* 80.

There was no precedent for the trial of Peeresses, when accused of treason or felony, till after *Eleanor*, Duchess of *Gloucester*, wife to the Lord Protector, was accused of treason and found guilty of witchcraft, in an ecclesiastical synod, through the intrigues of Cardinal *Beaufort*. This very extraordinary trial gave occasion to a special statute, 20 *Hen. 6. c. 9.* which declares the law to be, that Peeresses, either in their own right or by marriage, shall be tried before the same judicature as other Peers of the realm. *Moor* 769: 2 *Inst.* 50: 6 *Repl.* 52: *Staundf. P. C.* 152. If a woman, noble in her own right, marries a Commoner, she still remains noble, and shall be tried by her Peers; but if she be only noble by marriage, then by a second marriage with a Commoner, she loses her dignity; for as by marriage it is gained, by marriage it is also lost. *Dyer* 79: *Co. Litt.* 16. Yet if a Duchess Dowager marries a Baron, she continues a Duchess still; for all the nobility are *fares*, and therefore it is no degradation. 1 *Inst.* 16. *b:* 2 *Inst.* 50.

If a Queen Dowager takes a husband, noble or not noble, she by her subsequent marriage shall not lose her dignity. 2 *Inst.* 50. Yet if a woman, noble by descent, marries to an inferior degree of nobility, as if the daughter of a Duke marries a Baron, she shall have precedence only as a Baroness. *Orv.* 82.

A woman noble in her own right, or by a first marriage, marrying a Commoner, communicates no rank or title to her husband. 1 *Inst.* 326. *b.* There have been claims, and supported by authorities, by a husband after issue had, to assume the title of his wife's dignity, and after her death to retain the same as tenant by the curtesy, but it does not seem that such a claim would now be allowed. See 1 *Inst.* 29. *b. in n.*

A woman noble by marriage, afterwards marrying a Commoner, is generally called and addressed by the style and title which she bore before her second marriage; but this is only by curtesy, as the daughters of Dukes, Marquisses, and Earls are usually addressed by the

title of Lady; though in law they are Commoners. In a writ of partition brought by *Ralph Howard* and Lady *Anne Powes*, his wife, the Court held that it was a misnomer, and that it ought to have been by *Ralph Howard* and *Anne* his wife late wife of Lord *Powes* deceased. *Dy.* 79.

A Countess or Baroness may not be arrested for debt or trespass; for though, in respect of their sex, they cannot sit in Parliament, yet they are Peers of the Realm, and shall be tried by their Peers, &c. But a *capias* being awarded against the Countess of *Rutland*, it was held that she might be taken by the Sheriff; because he ought not to dispute the authority of the Court from whence the writ issued, but must execute it, for he is bound by oath so to do; and although by the writ itself it appeared, that the party was a Countess, against whom a *capias* would not generally lie, for that, in some cases, it may lie, as for a contempt, &c. therefore the Sheriff ought not to examine the judicial acts of the Court. 6 *Rep.* 52.

It hath been agreed, that a Queen Consort, and Queen Dowager, whether she continue sole after the King's death, or take a second husband, and he be a Peer or Commoner; and also all Peeresses by birth, whether sole or married to Peers or Commoners; and all Marchionesses and Viscountesses are entitled to a trial by the Peers, though not expressly mentioned in the *stat.* 20 *H.* 6. c. 9: 2 *Inst.* 50: *Cromb. Jurisd.* 33: 2 *Hawk. P. C. c.* 44. § 10, 11.

PEINE FORT ET DURE; See *Mute*.

PELA, A peel, pile, or fort. The citadel or castle in the *Isle of Man* was granted to Sir *John Stanley* by this name. *Pat.* 7 *H.* 4. m. 18. See *Man, Isle of*.

PELES, Issues arising from, or out of a thing. *Fitzh. Just.* 205.

PELF AND PELFRE, *Pelfra.*] In time of war, the Earl Marshal is to have of preys and booties, all the gelded beasts, except hogs, &c. which is called *Pelfre*. *Old MS.* It is used for the personal effects of a felon convict. *Plac. in Itin. apud Cestr.* 14 *Hen.* 7.

PELLAGE, The custom or duty paid for skins of leather. *Rot. Parl.* 11 *H.* 4.

PELLICIA, A pilch, *Tunica vel indumentum pelliceum; hinc superpelliceum*, a fur pilch or surplice. *Spelm.*

PELLIPARIUS, A leatherseller or skinner. *Pat.* 15 *Edw.* 3. p. 2. m. 45.

PELLOTA, Fr. *Pelote.*] The ball of the foot. See 4 *Inst.* 308.

PELT-WOOL, The wool pulled off the skin or pelt of dead sheep. See *stat.* 8 *H.* 6. c. 22.

PEN, A word used by the *Britons* for a high mountain, and also by the ancient *Gauls*; from whence those high hills which divide *France* from *Italy* are called the *Appenines*; and more to the purpose is the name of *Penmaenmawr* in *Wales*. *Camd. Britan.*

PENAL LAWS, Are of three kinds, viz. *Pœna pecuniaria*, *pœna corporalis*, and *pœna exilii*. *Cro. Jac.* 415. And penal statutes are made on various occasions, to punish and deter offenders; and they ought to be construed strictly, and not extended by equity; but the words may be interpreted beneficially, according to the intent of the legislators. 1 *Inst.* 54, 268. See 1 *Comm. Introd.* § 3. p. 89. Where a thing is prohibited by statute under a penalty, if the penalty, or part of it, be not given to him who will sue for the same, it goes and belongs to the King. *Rast. Entr.* 433: 2 *Hawk. P. C. c.* 26. § 17. But

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the King cannot grant to any person any penalty or forfeiture, &c. due by any statute before judgment thereupon had. *Stat. 21 Jac. 1. c. 3.* Though after plea pleaded, Justices of assise, &c. having power to hear and determine offences done against any penal statute, may compound the penalties with the defendant, by virtue of the King's warrant or Privy Seal.

The Courts at *Westminster* (particularly the Court of King's Bench) frequently give leave on motion, and an affidavit of circumstances, &c. to compound penal actions. Compounding without such leave, is punishable by indictment.

Where penalties are ordained by penal acts of Parliament to be recovered in any Court of Record, this is to be understood only of the Courts at *Westminster*; and not of the Courts of Record of inferior corporations. *Jenk. Cent. 228.* The spiritual Court may hold plea of a thing forbidden by statute upon a penalty; but they may not proceed on the penalty. *2 Lev. 222.* See further, titles *Information; Statutes; Action*; and as to the sanction of Laws by penalties, *1 Comm. Introd. p. 56, 7.*

PENALTY OF BONDS, &c.; See titles *Bonds; Mortgages.*

PENANCE, An ecclesiastical punishment, which affects the body of the penitent; by which he is obliged to give a public satisfaction to the church, for the scandal he hath given by his evil example. And in the primitive times, they were to give testimonies of their reformation, before they were re-admitted to partake of the mysteries of the church. In the case of incest, or incontinency, the sinner is usually enjoined to do a public Penance in the cathedral or parish church, or public market, bare-legged and bare-headed in a white sheet, and to make an open confession of his crime in a prescribed form of words; which is augmented or moderated according to the quality of the fault, and the discretion of the Judge.

So, in smaller faults, a public satisfaction or Penance, as the Judge shall decree, is to be made before the minister, churchwardens, or some of the parishioners, respect being had to the quality of the offence; as in the case of defamation, or laying violent hands on a minister, or the like. *God. Append. 18: Wood's Inst. 507.* Penance may be changed into a sum of money, to be applied to pious uses, and this is called commuting. *3 Inst. 150: 4 Inst. 336.* See *Articuli Cleri, 9 E. 2. c. 4: F. N. B. 53:* and this Dictionary, title *Clergy: Excommunication.*

PENANCE, At Common Law, where a person stands mute. See title *Mute.*

PENERARIUS, an ensign bearer. *John Parient* was Squire of the body, and *Penerarius* to King *Rich. II.*

PENITENTIARY HOUSES. See tit. *Transportation.*

PENNY; See *Peny.*

PENNYWEIGHT. As every pound *Troy* contained twelve ounces, each ounce was formerly divided into twenty parts, called Pennyweights; and though the Pennyweight be altered, yet the denomination still continues. Every Pennyweight is subdivided into twenty-four grains. *Cowell.*

PENON, mentioned in an antient statute, *11 Ric. 2. cap. 1.]* A standard, banner, or ensign, carried in war. *Cowell.*

PENSA SALIS, *Casei,* &c. A wey of salt or cheese containing 256 pounds. *Cowell.*

PENSAM, *Ad pensam*.] The antient way of paying into the Exchequer as much money for a pound sterling, as weighed twelve ounces *Troy*. Payment of a pound *de numero*, imported just twenty shillings; *ad scalam* twenty shillings and six-pence; and *ad pensam*, imported the full weight of twelve ounces. See *Lowndes's Essay on Coin*, p. 4. See *Scalam*.

PENSION, *Fr. Pension*.] An allowance made to any one without an equivalent. *Johns*. See *Pensioner*. To receive Pension from a foreign Prince or State, without leave of our King, has been held to be criminal, because it may incline a man to prefer the interest of such foreign Prince to that of his own country. See title *Contempt*.

All Pensions are liable to certain duties annually imposed by Parliament. See *Taxes*.

Persons having pensions from the Crown are incapable of being elected members of Parliament. See title *Parliament*, VI. B. (2).

PENSION OF CHURCHES, Certain sums of money paid to clergymen in lieu of tithes. Some Churches have settled on them annuities, Pensions, &c. payable by other churches; which Pensions are due by virtue of some decree made by an Ecclesiastical Judge on a controversy for tithes, by which the tithes have been decreed to be enjoyed by one, and a Pension instead thereof to be paid to another; or they have arisen by virtue of a deed made by consent of the Parson, Patron, and Ordinary; and if such Pension hath been usually paid for twenty years, then it may be claimed by prescription, and be recovered in the Spiritual Court, or a Parson may prosecute his suit for a Pension by prescription, either in that Court or at Common Law, by writ of annuity; but if he takes his remedy at law, he shall never afterwards sue in the Spiritual Court; if the prescription be denied, that must be tried by the Common Law. *F. N. B.* 51: *Hardr.* 230: *Ventr.* 120. A spiritual person may sue in the Spiritual Court, for a Pension originally granted and confirmed by the ordinary; but where it is granted by a temporal person to a clerk, he cannot; as if one grant an annuity to a Parson, he must sue for it in the Temporal Courts. *Cro. Eliz.* 675. See titles *Corody*; *Courts-Ecclesiastical*.

PENSIONS OF THE INNS OF COURTS, Annual payments of each member to the Houses: And also that which in the two Temples is called a Parliament, and in *Lincoln's Inn* a Council, in *Gray's Inn* is termed a Pension; being usually an assembly of the members to consult of the affairs of the Society.

PENSIONER, from Pension; one who is supported by an allowance at the will of another; a dependent. It is usually applied (in a public sense) to those who receive pensions or annuities from Government; who are chiefly such as have retired from places of honour and emolument.

PENSIONERS, *Pensionarii*.] Are a band of gentlemen so called, who attend as a guard on the King's person: they were instituted anno 1539, and have an allowance of fifty pounds a year, to maintain themselves and two horses for the King's service. See *Stow's Annals*, 793.

PENSION-WRIT. When a Pension writ is once issued, none sued thereby in any Inns of Court, shall be discharged or permitted to come into Commons, till all duties be paid. Order in *Gray's Inn*, wherein it seems to be a peremptory order against such of the society as are in arrear for Pensions and other duties. *Cowell*.

PENTECOSTALS, *Pentecostalia*.] Pious oblations made at the Feast of *Pentecost*, by parishioners to their priest, and sometimes by inferior churches or parishes, to the principal mother-church. Which oblations were also called *Whitsun-farthings*, and were divided into four parts, one to the parish priest, a second to the poor, a third for repair of the church, and a fourth to the Bishop. *Stephen's Procurations and Pentecostals*. See *Kennet's Glossary in Pentecostalia*.

PENY. Sax. *Penig*.] An antient current silver coin. 2 *Inst.* 575. The *Saxons* had no other sort of silver coin. It was equal in weight to our three-pence. Five made one shilling *Saxon*, and thirty made a mark, which they called *mancuse*, and weighed as much as three of our half-crowns. The *English* penny called sterling is round, without clipping, and weighs 32 *grana frumenti in medio spica*; twenty pence make an ounce, and twelve ounces make a pound. See *stats.* 20 *E.* 1: 27 *E.* 1. *st.* 3; 31 *E.* 1. It was made with a cross in the middle, and broke into halfpence and farthings. *Cowell. Mat. Paris* 1279. See *Denarius*.

PERAMBULATION, *Perambulatio*.] A travelling through, or over; as Perambulation of the forest is the surveying or walking about the forest, and the utmost limits of it, by Justices, or other officers thereto assigned to set down and preserve the metes and bounds thereof. *Stats.* 16 *Car.* 1. *c.* 16: 20 *Car.* 2. *c.* 3: 4 *Inst.* 30. See further, title *Forest*.

Perambulation of parishes is to be made by the minister, churchwardens, and parishioners, by going round the same once a year, in or about *Ascension* week: And the parishioners may well justify going over any man's land in their Perambulation, according to usage; and it is said, may abate all nuisances in their way. *Cro. Eliz.* 441.

There is also a Perambulation of manors; and a writ *de perambulatione faciendâ*, which lies where any encroachments have been made by a neighbouring lord, &c. then by the assent of the lords, the sheriff shall take with him the parties and neighbours, and make a Perambulation, and settle the bounds; also a commission may be granted to other persons to make Perambulation, and to certify the same in the Chancery, or the Common Pleas, &c. And this commission is issued to make Perambulation of towns, counties, &c. *New Nat. Br.* 206.

If tenant for life of a lordship, and one who is tenant in fee-simple of another lordship adjoining, sue forth this writ or commission, and by virtue thereof a Perambulation is made, the same shall not bind him in reversion; nor shall the Perambulation made with the assent of tenant in tail, bind his heir. And it is said this assent of the parties to the Perambulation ought to be acknowledged and made personally in Chancery, or by *dedimus protestatem*; and being certified, the writ or commission issues, &c. *New Nat. Br.* 206. The writ begins thus: *The King to the Sheriff, &c. We command you, that taking with you twelve discreet lawful men of your county, in your proper person, you go to the land of A. B. of, &c. and the land of C. D. of, &c. and upon their oaths you cause to be made Perambulation betwixt the lands of the said A. in, &c. and of the said C. in &c.; so that it be made by certain metes, or bounds and divisions, &c. And make known to our Justices at Westminster, &c.*

If Perambulation be refused to be made by a lord, the other lord who is grieved thereby shall have a writ against him called *de Ra-*

tionabilibus Divisis. See *F. N. B.* 128, 133; *Reg. Orig.* 157: and *Rationabilibus Divisis.*

Questions as to boundaries, limits, &c. are now, however, in general determined, by actions of trespass, ejectment, &c.

Actions upon Writs of Perambulation were authorised in *Scotland* by the act 1597, c. 79. to settle the bounds of disputed properties adjoining each other.

PERANGARIA; See *Angaria.*

PERCA, for *Pertica*, a perch of land. *Mon. Angl.* ii. 87.

PERCAPTURA, A place in a river made up with banks, &c. for the better preserving and taking fish. *Paroch. Antiq.* 120.

PERCH, A rod or pole of sixteen feet and a half in length, whereof forty in length and four in breadth make an acre of ground. *Cromb. Jurisd.* 222. But by the customs of several counties, there is a difference in this measure: in *Staffordshire* it is twenty-four feet; and in the forest of *Sherwood* twenty-five feet, the foot there being eighteen inches long; and in *Herefordshire*, a perch of ditching is twenty-one feet; the perch of walling sixteen feet and a half; and a pole of denshiered ground is twelve feet, &c. *Skene.*

PER CUI ET POST, Writs of entry so called. See titles *Entry; Writ of Entry.*

PERDINGS, The dregs of the people, viz. Men of no substance. *Leg. Hen.* 1. c. 29.

PERDONATIO UTLAGARIÆ. A pardon for a man, who for contempt in not yielding obedience to the process of the King's Court, is outlawed, and afterwards of his own accord surrenders. *Reg. Orig.* 28; *Leg. Ed. Confess.* c. 18, 19.

PEREMPTORY *Peremptorius*, from the verb *perimere*, to cut off.] Joined with a substantive, as action or exception, signifies a final and determinate act, without hope of renewing or altering. So *Fitzherbert* calleth a peremptory action. *Nat. Brev.* 35, 38, 104, 108: and nonsuit peremptory. *Idem*, 5, 11. A peremptory exception, *Bracton, lib. 4. cap. 20.* *Smith de Ref. Anglor. l. 2. c. 13,* calleth that a peremptory exception, which makes the state and issue in a cause. *Cowell.*

A peremptory day is when business by rule of Court is to be spoke to at a precise day; but if it cannot be spoken to then, the Court, at the prayer of the party concerned, will give a farther day without prejudice to him. See titles *Motion in Court; Practice.*

PEREMPTORY CHALLENGE of Jurors; See title *Jury II; IV.* 1.

PEREMPTORY MANDAMUS; See *Mandamus.*

PEREMPTORY WRIT; See *Optional Writ; Original.*

PERFECTION OF THE KING; See tit. *King.* V. 2.

PERINDE VALERE, A term in the Ecclesiastical Law, signifying a dispensation granted to a clerk, who being defective in capacity for a benefice, or other ecclesiastical function, is *de facto* admitted to it; and it hath the appellation from the words, which make the faculty as effectual to the party dispensed with, as if he had been actually capable of the thing, for which he is dispensed with at the time of his admission. In *stat. 25 H. 8. c. 21,* it is called a writ. See *Gibs.* 87.

PERINDINARE, To stay, remain, or abide in a place. *Matt. West. an.* 1016: *Fortesc.* c. 36.

PERIPHRAISIS, Circumlocution; use of many words to express the sense of one. *Johns.*

No Periphrasis, or circumlocution, will supply words of art, which the law hath appropriated for the description of offences in indictments. No Periphrasis, in indictment, or conclusion, shall make good an indictment which doth not bring the fact within all the material words of a statute; unless the statute be recited, *Uc. Cro. Eliz.* 535, 749. See title *Indictment*.

PERJURY,

AND SUBORNATION THEREOF.

PERJURY; *Perjurium; mendacium cum juramento firmatum.*] Is defined to be, a crime committed, when a lawful oath is administered, by any who hath authority, to a person, in any judicial proceeding, who swears wilfully, absolutely, and falsely, in a matter material to the issue, or cause in question, by their own act, or by the subornation of others. 3 *Inst.* 163, 4.

PERJURY by the Common Law is defined a wilful false oath by one who, being lawfully required to depose the truth, in any proceeding in a court of justice, swears absolutely, in a matter of some consequence to the point in question, whether he be believed or not. 1 *Hawk. P. C. c.* 69. § 1.

SUBORNATION OF PERJURY, by the Common Law, is, an offence in procuring a man to take a false oath amounting to Perjury, who actually takes such oath; but if the person incited to take such oath do not actually take it, the person by whom he was so incited is not guilty of subornation; yet he is liable to be punished, not only by fine, but also by infamous corporal punishment. 1 *Roll. Abr.* 41. 57: *Yelv.* 72: *Cro. Jac.* 158: 2 *Keb.* 399: 3 *Mod.* 122: 1 *Hawk. P. C. c.* 69. § 10.

I. *Of Perjury by the Common Law; and how restrained and punished.*

II. *Of the Punishment of Perjury by Statute.*

I. 1st, It is necessary to constitute the offence of Perjury, that the false oath be taken wilfully, *viz.* with some degree of deliberation; and it must also be *corrupt*; (that is, committed *malò animo*;) it must be *wilful*, positive, and absolute; not merely owing to surprise or inadvertency, or a mistake of the true state of the question. 5 *Mod.* 350: 4 *Comm.* 137: 1 *Hawk. P. C. c.* 69. § 2. See 1 *Term Rep. K. B.* 69.

2dly, The oath must be taken either in a judicial proceeding, or in some other public proceeding of the like nature, wherein the King's honour or interest is concerned; or before commissioners appointed by the King to inquire of the forfeitures of his tenants, or of defective titles wanting the supply of the King's patents; but it is not material whether the Court, in which a false oath is taken, be a Court of Record or not, or whether it be a Court of Common Law, or a Court of Equity or Civil Law, *Uc.* or whether the oath be taken in face of the Court or out of it, before persons authorised to examine a matter depending in it; as before the Sheriff on a writ of inquiry, *Uc.* or whether it be in relation to the merits of a cause, or in a collateral matter; as where one, who offers himself to be bail for another, swears that his substance is greater than it is, *Uc.* but neither a false oath in a mere private matter, as in making a bargain, *Uc.* nor the breach of a promissory oath, whether public or private, are punishable as

Perjury. 1 *Hawk. P. C. c. 69. § 3.* The law takes no notice of any Perjury but such as is committed in some Court of Justice having power to administer an oath; or before some magistrate or proper officer, invested with a similar authority, in some proceedings relative to a suit, or a criminal prosecution; for it esteems all other oaths unnecessary at least, and therefore will not punish the breach of them. For which reason it is much to be questioned, how far any magistrate is justifiable in taking a voluntary affidavit in any extrajudicial matter, as is now too frequent upon every petty occasion; since it is more than possible that by such idle oaths a man may frequently *in foro conscientie*, incur the guilt, and at the same time evade the temporal penalties of Perjury. 4 *Comm. c. 10. p. 137.* See the *stat. 15 Geo. 3. c. 39.* and *Burn's Justice*, title *Oath I.*

An indictment for Perjury assigned on an affidavit sworn before the court of B. R. need not state, nor is it necessary to prove, that the affidavit was filed of record, or exhibited to the court, or in any manner used by the party. 7 *Term Rep. K. B. 315.*

3dly. The oath ought to be taken before persons lawfully authorised to administer it; for if it be taken before persons acting merely in a private capacity, or before persons pretending to a legal authority of administering such oath, but having no such authority, it is not punishable as Perjury; yet a false oath taken before commissioners, whose commission at the time is in strictness determined by the demise of the King, is Perjury; if taken before such time as the commissioners had notice of such demise; for it would be of the utmost ill consequence, in such case, to make their proceedings wholly void. 1 *Hawk. P. C. c. 69. § 4.*

It is remarkable, that the *House of Commons* have no power to administer an oath, except in a few particular instances where that power is granted to them by express statute. It is supposed that the reason they have never obtained the general authority of administering an oath, is owing to the jealousy of the upper House; which, by securing this privilege to itself, prevents the Commons from participating in the judicature of Parliament. 4 *Comm. c. 10. in n.*

4thly. The oath ought to be taken by a person sworn to depose the truth; therefore a false verdict comes not under the notion of Perjury, because the Jurors swear not to depose the truth, but only to judge truly of the depositions of others; but a man may be as well perjured by an oath in his own cause, (*e. g.* in an answer in Chancery, or in an answer to interrogatories concerning a contempt, or in an affidavit, &c.) as by an oath taken by him as a witness in another's cause. 1 *Hawk. P. C. c. 69. § 5.*

5thly. It is not material, whether the thing sworn be true or false, where the person who swears it in truth knows nothing of it. 1 *Hawk. P. C. c. 69. § 6.* But see 1 *Term Rep. K. B. 69.* that the oath must be false.

6thly. The oath must be taken absolutely and directly; therefore if a man only swears as he thinks, remembers or believes, he cannot be guilty of Perjury. 1 *Hawk. P. C. c. 69. § 7.* But a man may be indicted for Perjury in swearing that he believes a fact to be true, which he must know to be false. *Leach, 270.*

7thly. The thing sworn ought to be some way material; for if it be wholly foreign from the purpose, or immaterial, and neither pertinent

to the matter in question, or tending to aggravate or extenuate the damages, nor likely to induce the Jury to give credit to the substantial part of the evidence, it cannot amount to Perjury; because it is wholly insignificant; as where a witness introduces his evidence, with an impertinent preamble of a story, concerning previous facts, no ways relating to what is material, and is guilty of a falsity as to such facts; but a witness may be guilty of Perjury in respect to a false oath, concerning a mere circumstance, if such oath have a plain tendency to corroborate the more material part of the evidence; as if in trespass for spoiling the plaintiff's close, with defendant's sheep, a witness swears that he saw such a number of defendant's sheep in the close, and being asked how he knew them to be defendant's, swears that he knew them by such a mark, which he knew to be the defendant's, where in truth defendant never used any such mark. 1 *Hawk. P. C. c. 69. § 8.* And it is incumbent on the prosecutor to prove the materiality of the Perjury. *Ibid. in n.*

8thly. It is not material whether the false oath was credited or not; or whether the party, in whose prejudice it was taken, was in the event damaged by it; for the prosecution is not grounded on the damage to the party, but on the abuse of public justice. 1 *Hawk. P. C. c. 69. § 9.* On the trial, the oath will be taken as true, until it be disproved; and therefore to convict a man of Perjury, one probable credible witness is not enough; for the evidence must be strong, clear, and more numerous on the part of the prosecution, than the evidence on the other side. Therefore the law will not permit a man to be convicted of Perjury, unless there are two witnesses at least. 10 *Mod. 195.* Nor shall the party prejudiced by the Perjury be admitted as a witness to prove it. *Lord Raym. 396.*

The punishment of Perjury and subornation, at Common Law, has been various. It was antiently death; afterwards banishment, or cutting out of the tongue; then forfeiture of goods; and now it is fine and imprisonment, and never more to be capable of bearing testimony. 3 *Inst. 163.* The *stat. 5 Eliz. c. 9.* (see *post II.*) if the offender be prosecuted thereon, inflicts the penalty of perpetual infamy, and a fine of 40*l.* on the *suborner*: and in default of payment, imprisonment for six months, and to stand in the pillory: (*with both ears nailed thereto. Qu.² see the statute.*) Perjury itself is, by that statute, punished with six months' imprisonment, perpetual infamy, and a fine of 20*l.* or not paying the fine to have both ears nailed to the pillory. See *post II.* The prosecution, however, is usually carried on for the offence at Common Law; (by indictment at the assises, or in the King's Bench;) especially as to the penalties before inflicted, the *stat. 2 Geo. 2. c. 25.* superadds a power of punishment, by committing the offender to the House of Correction, and transportation for seven years. 4 *Comm. c. 10:* see *post II.*

It has sometimes been wished, that Perjury, at least upon capital accusations, whereby another's life has been, or *might have been*, destroyed, was rendered capital, upon a principle of retaliation: and certainly the odiousness of the crime seems to plead strongly in behalf of such a law. Where, indeed, the death of an innocent person has actually been the consequence of such wilful Perjury, it falls within the guilt of deliberate murder, and deserves an equal punishment; which our antient laws, in fact, inflicted. *Brit. c. 5.* But *Coke*

says expressly it is not holden for murder at this day. 3 *Inst.* 48: and see *Post.* 121, 132: 4 *Comm. c.* 10. *ft.* 38, 9: *c.* 14, *ft.* 196.

II. By *English act*, 5 *Eliz. c.* 9. and *Irish act*, 28 *Eliz. c.* 1. it is enacted, "That whoever shall unlawfully and corruptly procure any witness to commit any wilful and corrupt perjury, or shall unlawfully or corruptly procure or suborn any witness, who shall be sworn to testify *in perpetuam rei memoriam*, shall, for such offence, being thereof lawfully convicted or attainted, forfeit the sum of 40*l.* And if such offender, so convicted or attainted, shall not have goods, &c. to the value of 40*l.* then such person shall suffer imprisonment by the space of one half year, without bail; and stand upon the pillory the space of one hour, in some market town next adjoining to the place where the offence was committed, in open market there; or in the market town itself where the offence was committed.

"That no person, so convicted or attainted, shall be received as a witness in any Court of Record, till such judgment shall be reversed; and that on such reversal the party grieved shall recover damages against the party who procured the judgment so reversed to be first given.

"That if any person shall, either by the subornation, unlawful procurement, sinister persuasion, or means, of any other, or by their own act, consent, or agreement, wilfully and corruptly commit wilful Perjury, that then every offender, being duly convicted, shall forfeit 20*l.* and have imprisonment by the space of six months, without bail: and the oath of such offender shall not from thenceforth be received in any Court of Record, until such judgment be reversed, &c.; on which reversal, the party grieved shall recover damages in the manner before mentioned.

"That if such offender shall not have goods or chattels to the value of 20*l.*, then he shall be set on the pillory, where he shall have both ears nailed.

"One moiety of the forfeitures to the King, the other to the person grieved, who will sue for the same, &c. and that as well the Judge of every Court where any suit shall be, and whereon any such Perjury shall be committed, as also the Justices of assise and gaol delivery, and Justices of peace at their quarter sessions, may inquire of, hear, and determine offences against the act.

"The act shall no way extend to any Spiritual or Ecclesiastical Court; but every offender shall be punished by such usual laws as are used in the said Courts.

"The statute shall not restrain the authority of any Judge, having absolute power to punish Perjury before the making thereof; but every such Judge may proceed in the punishment of all offences, punishable before making the statute, as they might have done to all purposes; so that they set not on the offender less punishment than contained in the act."

In the construction of the *English* statute, the following opinions have been holden:

That every indictment, or action, on this statute must exactly pursue the words of it: therefore, if it allege, that the defendant deposed such a matter *falso & deceptivè*, or *falso & corruptè*, or *falso & voluntariè*, without saying *voluntariè & corruptè*, it is not good; though it

conclude, that *sic voluntarium & corruptum commisit perjurium contra formam statuti*, &c. Also it is necessary expressly to shew, that the defendant was sworn; and it is not sufficient to say, that *tacto per se sacro evangelio deposuit*. *Cro. Eliz.* 147. *Hell.* 12: *Savil.* 43: 2 *Leon.* 211: 1 *Show.* 198. *Cro. Eliz.* 105. 1 *Hawk. P. C. c.* 69. § 17.

But there is no need to shew, whether the party took the false oath through the subornation of another, or of his own act, though the words of the statute are, "If persons by subornation, &c. or their own act, &c. shall commit wilful Perjury;" for there being no medium between the branches of this distinction, they express no more than the law would have implied; therefore operate nothing. 3 *Bulst.* 147. 1 *Hawk. P. C. c.* 69. § 18.

It hath been adjudged that a man cannot be guilty of Perjury within this statute, in any case wherein he may not possibly be guilty of subornation of Perjury within it; for it is reasonable to give the whole statute the same construction: neither can it be well intended, that the makers of the statute meant to extend its purview farther as to Perjury, which they seem to esteem the *lesser* crime, than to subornation of Perjury, which they seem to esteem the *greater*: therefore, since the clause concerning subornation of Perjury, mentioning only matters depending by writ, bill, plaint, or information, concerning hereditaments, goods, debts, or damages, &c. extends not to Perjury on an indictment or criminal information; the clause concerning Perjury, though penned in more general words, hath been adjudged to come under the like restriction: also since the clause concerning subornation of Perjury relates only to Perjury by *witnesses*, that concerning Perjury shall extend only to the like Perjury; therefore, not to Perjury in an answer in Chancery; or in swearing the peace against a man; or in any presentment by homage in a Court-baron; or in wager of law; or in swearing before commissioners of inquiry of the King's title to lands: and by the opinions of some, a false affidavit against a man in a Court of justice is not within the statute; but if such affidavit be by a third person, and relate to a cause depending in suit before the court, and either of the parties in variance be grieved, in respect of such cause, by reason of the Perjury, it may strongly be argued that it is within the purview of the statute: also a false oath before the Sheriff, on a writ of inquiry, is within the statute. 5 *Co.* 99: *Cro. Jac.* 120: 3 *Inst.* 164: 2 *Leon.* 201: *Yelv.* 120: *Cro. Eliz.* 148: 2 *Roll. Abr.* 77: 1 *Hawk. P. C. c.* 69. §§ 19, 21.—But it has been decided, that any Court may punish such an offence committed in the face of the Court, under this statute; 5 *Eliz. c.* 9.—Therefore, where one made an affidavit in the Court of Common Pleas, and confessed it was false, the Court recorded his confession, and sentenced him to the pillory: and the objections that the Court had no jurisdiction, and that the offender ought to have been brought before the Court by indictment, were over-ruled. 8 *Mod.* 179: 1 *Hawk. P. C. c.* 69. § 21, *in n.*

It hath been collected, from the clause which gives an action to the party grieved, that no false oath is within the statute, which doth not give some person a just cause of complaint; therefore, if the thing sworn be true, though it be not known by him who swears it to be so, the oath is not within the statute, because it gives no just cause of complaint to the other party, who would take advantage of another's

want of evidence to prove the truth; from the same ground, no false oath can be within the statute, unless the party against whom it was sworn suffered some disadvantage by it; therefore, in every prosecution on the statute, you must set forth the record wherein you suppose the Perjury to have been committed, and must prove at the trial that there is such a record, either by actually producing it, or an attested copy: also in the pleadings, you must not only set forth the point wherein the false oath was taken, but must also shew how it conduced to the proof or disproof of the matter in question; and if an action on the statute be brought by more than one, you must shew how the Perjury was prejudicial to each of the plaintiffs: But it seems that a Perjury which tends only to aggravate or extenuate the damages, is as much within the statute, as a Perjury which goes directly to the point in issue; and a Perjury, in a cause wherein an erroneous judgment is given, is a good ground of prosecution upon the statute till the judgment be reversed. 1 *Hawk. P. C. c. 69. § 22.*

If Perjury be committed, that is within this statute, but the indictment concludes not *contra formam statuti*, yet it is good at Common Law; but not to bring one within the corporal punishment of the statute. 2 *Hale's Hist. P. C. 191.*

By *British acts*, 2 *Geo. 2. c. 25. § 2.* (revived and made perpetual by 9 *Geo. 2. c. 18.*) and by the *Irish act*, 3 *Geo. 2. c. 4. § 2:* (see also 17 & 18 *Geo. 3. c. 36:* 31 *Geo. 3. c. 44.*) the more effectually to deter persons from committing wilful and corrupt Perjury, or subornation of Perjury, it is enacted, "That, besides the punishment to be inflicted by law for so great crimes, it shall be lawful for the Court or Judge before whom any person shall be convicted of wilful and corrupt Perjury, or subornation of Perjury, to order such person to be sent to some *house of correction* for a time not exceeding seven years, there to be kept to hard labour during the time; otherwise, to be *transported* for a term not exceeding seven years, as the Court shall think proper; therefore judgment shall be given, that the person convicted shall be committed or transported accordingly, besides such punishment as shall be adjudged to be inflicted on such person agreeable to the laws in being; and if transportation be directed, the same shall be executed in such manner as is provided by law for transportation of felons; and if any person so committed or transported shall voluntarily escape or break prison, or *return from transportation*, before the expiration of the time, such person, being lawfully convicted, shall *suffer death* as a felon; and shall be tried for such felony in the county where he so escaped, or where he shall be apprehended." The *British act* does not extend to *Scotland*.

By *stat. 8 Geo. 1. c. 6.* it is enacted, "That a *false affirmation* made by Quakers shall be liable to the same punishment as wilful Perjury." The like provision is made in *Ireland*, by the *Irish act* 19 *Geo. 2. c. 18.* See titles *Quakers; Oaths.*

By *stat. 31 Geo. 2. c. 10. § 24.* the taking or procuring to be taken, a false oath to obtain probates or letters of administration to seamen, is made felony, without benefit of clergy.

By various acts the penalties of Perjury are extended to false oaths taken before competent Jurisdictions.

By the *British act* 23 *Geo. 2. c. 11.* which extends only to *England* and *Wales*, and by the *Irish act* 31 *Geo. 3. c. 18.* for *Ireland*, it is en-

acted, "That, in every information or indictment for Perjury, it shall be sufficient to set forth the substance of the offence charged, and by what Court, or before whom the oath was taken, (averring such Court or person to have authority to administer the same,) together with the proper averments to falsify the matter wherein the Perjury was assigned; without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding; and without setting forth the commission or authority of the Court or person before whom the Perjury was committed. § 1.

"In every information or indictment for subornation of Perjury, it shall be sufficient to set forth the substance of the offence charged; without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding; and without setting forth the commission or authority of the Court or person before whom the Perjury was committed, or agreed to be committed. § 2.

"It shall be lawful for any Justice, (sitting the Court, or within twenty-four hours after,) to direct any person examined as a witness before them to be prosecuted for Perjury, in case there appear a reasonable cause; and to assign the party injured, or other person undertaking such prosecution, counsel, who shall do their duty without fee. And every prosecution so directed shall be carried on without payment of any tax, and without payment of any fees in Court, or to any officer of the Court. And the Clerk of assize, or his associate or prothonotary, or other officer of the Court attending when such prosecution is directed, shall, without fee, give the party injured, or other person undertaking such prosecution, a certificate of the same being directed, with the names of the counsel assigned him; which certificate shall be deemed sufficient proof of such prosecution having been directed. Provided that no such direction or certificate shall be given in evidence upon any trial against any person upon a prosecution so directed. § 3."

In an indictment for Perjury on a trial formerly had, it is not necessary to set forth so much of the proceedings of the trial as will shew the materiality of the question on which the Perjury is assigned: it is sufficient to allege generally, that the particular question became a material question. But where the prosecutor undertakes to set out more than he need of the proceedings, he must set them out correctly. *5 Term Rep. K. B.* 318.

In general, the Court will oblige the defendant to plead or demur, even to a defective indictment for this offence. *2 Hawk. P. C. c.* 25. § 146. They are also very cautious in granting a *certiorari* to remove it. *2 Hawk. P. C. c.* 27. § 28. And permission has been refused in Chancery to amend an answer, where an indictment for Perjury had only been threatened: even where the party, having no interest, could not be supposed to make the false oath intentionally. *1 Bro. P. C.* 419. For it is the province of the Grand Jury to judge of the intention; and what the Grand Jury may find, the Court will never expunge. *Hardw.* 203.

In *Scotland* the punishment of Perjury is directed by statute, the last of which, 1555, c. 47. declares Perjury to be punishable by confiscation of moveables, piercing the tongue, and infamy: to which the Judge, in aggravated cases, may add any other penalty that the case

seems to require. By the same act, subornation of Perjury is punishable as Perjury.

PERMISSIVE WASTE; See *Waste*.

PERMIT, from *permitto*.] A licence or warrant for persons to pass with and sell goods, on having paid the duties of customs or excise for the same. See *Customs*.

PERMUTATIONE *archidiaconatus et ecclesiæ eidem annexæ cum ecclesiâ et præbendâ*. A writ to an ordinary, commanding him to admit a clerk to a benefice, upon exchange made with another. *Reg. Orig.* 307.

PERMUTATION or BARTER being the exchange of one moveable subject for another, may, by the law of *Scotland*, be completed by consent. See further this Dict. title *Exchange*.

PER MY ET PER TOUT; See title *Joint-tenants*.

PERNANCY, from the Fr. *prendre*.] A taking or receiving; as tithes in Pernancy, are tithes taken, or that may be taken, in kind. So, *Pernancy* of the profits means the taking the profits. See the next title.

PERNOR OF PROFITS, He who receives the profits of lands, &c. and is all one with *cestui que use*. 1 *Rep.* 123. The King has the *pernancy* of the profits of the lands of an outlaw, in personal actions; and by seizure shall hold against the alienation of such outlaw, &c. *Raym.* 17: See *Co. Litt.* 589. b: and 12 *R. 2. c.* 15.

PERPARS, A part of the inheritance. *Fleta, lib.* 2. c. 54. par. 19.

PERPETUATING THE TESTIMONY OF WITNESSES. If Witnesses to a disputable fact are old and infirm, it is usual to file a bill in Chancery, to perpetuate the testimony of those witnesses, although no suit is depending; for, it may be, a man's antagonist only waits for the death of some of them to commence his suit. 3 *Comm.* 450. See titles *Chancery*; *Evidence*.

PERPETUITY. A *Perpetuity* is, where, though all who have interest should join in a conveyance, yet they could not bar or pass the estate. But if, by concurrence of all having interest, the estate-tail may be barred, it is no perpetuity. *Ch. Cas.* 213. and see 3 *Ch. Ca.* 35.

Perpetuities are absolute or qualified. And estates-tail from the time of the statute *De donis*, till common recoveries were found out, were looked upon as Perpetuities. 12 *Mod.* 282.

Various have been the attempts to establish Perpetuities, by controlling the exercise of that right of alienation, which is inseparable from the estate of a tenant in tail. The chief of them are brought together in *Taylor d. Atkins v. Horde*, 1 *Burr.* 84; where it is observed, that the power to suffer a common recovery is a privilege inseparably incident to an estate-tail. It is a *potestas alienandi*, which is not restrained by the statute *De donis*; and has been so considered ever since *Taltarum's case*, 12 *E. 4. 14. b. p.* 16: and this power to suffer a common recovery cannot be restrained by condition, limitation, custom, recognizance, statute, or covenant. *Treat. Eq.* ii. c. 3. § 5. in n. See this Dictionary, titles *Limitation of Estates*; *Tail and Fee-tail*; *Conveyance*, &c.

A Perpetuity is a thing odious in law, and destructive to the commonwealth; it would put a stop to the commerce, and prevent the circulation of the property of the kingdom. *Vern.* 164.

Every executory devise is a Perpetuity, as far as it goes, *i. e.* an

estate unalienable, though all mankind join in the conveyance. 1 *Salk.* 229. See title *Executory Devise*.

It is absolutely against the constant course of Chancery to decree a Perpetuity, or give any relief in that case. 1 *Chan. Ref.* 144.

PERPETUITY OF THE KING; See title *King*, V. 2.

PER QUÆ SERVITIA, A judicial writ issuing from the note of a fine; and lieth for cognisee of a manor, seignior, chief rent, or other services, to compel him who is tenant of the land at the time of the note of the fine levied to attorn unto him. *West. Symbol. part 2. title Fines, sect. 126. Old Nat. Brev. 155.* See 16 *Vin. Abr.* title *Per quæ servitia*.

PERQUISITES, *Perquisitum*.] Any thing gotten by industry, or purchased with money, different from that which descends from a father or ancestor; and so *Bracton* uses it, when he says, *Perquisitum facere*, lib. 2. cap. 30. num. 3. and lib. 4. c. 22. See *purchase*.

PERQUISITES OF COURTS, Are commonly those profits which arise to lords of manors, from their court baron, above the yearly revenue of the land; as fines of copyholds, heriots, amerciaments, &c. *Perk.* 20, 21.

PERQUISITES OF OFFICES; See *Fees*.

PER QUOD, Words made use of by a plaintiff in his declaration, in the averring of particular damage to have happened, without which his action would not have been maintainable. As in slander, to say that such a clergyman is a bastard, he cannot for this bring any action against me, unless he can shew some special loss by it: in which case he may bring his action against me, for saying he was a bastard, by which (*per quod*) he lost the presentation to such a living. 4 *Ref.* 17: 1 *Lev.* 248: 3 *Comm.* 124. So in a declaration in trespass, for an injury to a wife or servant; the plaintiff states *per quod*, by which, he lost *consortium* of the one, or *servitium* of the other.

PERSON, A man or woman; also the state or condition whereby one man differs from another.

PERSON, Injuries to, are such as relate to life, limb, body, health, or reputation. See 3 *Comm.* and this Dictionary, title *Liberty*, &c.

PERSONABLE, *personabilis*.] Enabled to maintain plea in court: *e. g.* the defendant was judged *personable* to maintain this action. *Old Nat. Brev.* 142. The tenant pleaded that the wife was an *alien*, born in *Portugal*, and judgment was demanded whether she should be answered: the plaintiff saith, she was made personable by parliament, *i. e.* as the civilians would speak it, *habere personam standi in judicio*. *Kitch.* 214. Personable also signifies to be of capacity to take any thing granted or given. *Plowd.* 27.

PERSONAL, *personalis*.] Being joined with the substantives, things, goods, or chattels, as things personal, goods personal, chattels personal, signifies any moveable thing, quick or dead, *West. Symbol. part 2. sect. 58.* Thus theft is an unlawful felonious taking way of the moveable personal goods of another. See titles *Larceny*, *Felony*.

PERSONAL ACTION; see *Action*, *personal*.

PERSONAL SERVICES; See *Tenures*.

PERSONAL TITHES, Are tithes paid of such profits as come by the labour of a man's person; as by buying and selling, gains of merchandise, and handicrafts, &c. See title *Tithes*.

PERSONALTY, *personalitas*.] An abstract of personal; the ac-

tion is in the Personalty, *i. e.* it is brought against the right person, or the person against whom *in law* it lies. *Old Nat. Brev.* 92. Or it is to distinguish actions and things personal, from those that are real.

PERSONATE, To represent by a fictitious or assumed character, so as to pass for the person represented. *Johns.*

If one of *my name* levies a fine of *my land* in *my name*, I may well confess and avoid this fine, by shewing the *special matter*. But if a stranger, who is not of *my name*, levies a fine of *my land* in *my name*, I shall not be received to aver that I did not levy the fine, but another in *my name*, for that is merely contrary to the record; and so it is of a recognizance, and other matters of record. But when the fraud appears to the Court, they may enter a vacat on the roll, and so make it no fine, although the party cannot avoid it by averment, during the time it remains a record. *Cro. Eliz.* 531. See title *Fine*.

B. was taken in execution upon a recognizance of bail, and he made it appear to the Court, that *he never acknowledged the recognizance, but was personated by another*; and thereupon it was moved, that the bail might be vacated, and he discharged, as was done in *Cotton's* case. 2 *Cro.* 256. But the Court said, since the *stat.* 21 *Jac. cap.* 26. (see title *Bail*, by which this offence was made *felony without clergy*,) it is not convenient to vacate it until the offender is convicted; and so it was done in *Spicer's* case; wherefore it was ordered, that *B.* should bring the money into Court, and be at large to prosecute the offender. *Twisden* said it must be tried in *Middlesex*, though the bail was taken at a Judge's chambers in *London*, because filed here, and the entry is *venit coram Domino Rege, &c.* so it differs from a recognizance acknowledged before Lord *Hobart*, upon *stat.* 23 *H.* 8. *c.* 6. at his chambers, and recorded in *Middlesex*; there the *scire facias* may be either in *London* or *Middlesex*, *Hob.* 195, 196: *Vent.* 301: *Mod.* 46. *Cockerel*, who personated *Beesley*, was hanged at *Tyburn*, but the rope was immediately cut; and afterwards *Beesley* on motion had restitution of his goods in the hands of the Sheriff. 2 *Jo.* 64.

A commission of rebellion was awarded against *A.* whereupon *B.* came before the commissioners and affirmed himself to be the person. The commissioners apprehended him by virtue of their commission; but *per Hale*, Ch. B. the commissioners have no warrant to take him by their commission; *his affirming himself to be the person will not excuse them in false imprisonment*, as has been held on executing a *capias*. *Hard.* 323.—See further, titles *Bail*; *Fine of Lands*; *Forgery*; *Fraud*, &c.

PERSONS, Are divided by law into either *natural Persons*, or *artificial*. Natural Persons are such as the God of Nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called Corporations, or bodies Politic. 1 *Comm.* 123; 467.

As to the *Rights of persons*, see this Dictionary, title *Liberty*.

PERTICATA TERRÆ, The fourth part of an acre. See *perch*.

PERTINENTS, The *Scotch* term for *Appurtenances*: See that title.

PERVISE, According to *Somner*, the Palace-yard at *Westminster*. *Somn. Gloss.* See his *Gloss.* in 10 *scriptores*, verbo *Triforium*; and see *Wood's Hist. of Oxford*, 2 *par. fol.* 6; and this Dictionary, title *Parvise*.

PESA, *Pensa, Pisa.*] A *wey* or *weigh*, or certain weight and measure of cheese and wool, &c. containing two hundred and fifty-six pounds. *Cowell.*

PESAGE, *Pesagium.*] A custom or duty paid for weighing merchandize, or other goods. *Seld. tit. Hon.*

PESARIUS, A weigher. *Cowell.*

PESSONA, Mast of oaks, &c. or money taken for mast, or feeding hogs. *Mon. Ang. ii. 213.* See *Mast.*

PESSURABLE, PESTARBLE, or PESTARABLE WARES, Seem to be such wares or merchandize as pester, and take up much room in a ship. See stat. 32 H. 8. c. 14.

PETER-CORN, Is mentioned in some of the ancient registers of our bishops, particularly in that of St. *Leonard de Ebor*, which contains a grant thereof by King *Athelstane*, &c. *Collect. Dodaw. MS.*

PETER-PENCE, *Denarii Sancti Petri.*] Otherwise called in the *Saxon* tongue *Romescoth*, the fee of *Rome*, or due to *Rome*; also *Romescot* and *Rome-pienning*; was a tribute given by *Ina*, King of the *West Saxons*, being in pilgrimage at *Rome*, in the year of our Lord 720, which was a *pienny* for every house. *Lamb. Explication of Saxon Words*, verbo *Nummus*. And the like given by *Offa*, King of the *Mercians*, through his dominions, in anno 794, not as a tribute to the Pope, but in sustentation of the *English* school or college there; and it was called *Peter-pence*, because collected on the day of St. *Peter ad Vincula*. *Spelm. de Council. tom. i. fol. 2, 3.* And see *St. Edward's Laws*, num. 10: King *Edgar's Laws*, 78. c. 4: *Stow's Annals*, p. 67. It amounted to 300 marks and a noble yearly. *Leg. Hen. 1. c. 1.*

It was first prohibited by the statute of *Carlisle*, 35 E. I.; and afterwards by *Edw. III.* It was abrogated by stat. 25 H. 8. c. 21: but revived by stat. 1 & 2 Ph. & Mar. c. 8. and at length wholly abrogated by stat. 1 Eliz. c. 1.

PETER AD VINCULA; See *Gule of August.*

PETITION, *Petitio*] A supplication made by an inferior to a superior, and especially to one having jurisdiction. *S. P. C. c. 15.* It is used for that remedy, which the Subject hath to help a wrong done by the King, who hath a prerogative not to be sued by writ: in which sense it is either general, that the King do him right, whereupon follows a general indorsement upon the same, *Let right be done the party*; or it is special, when the conclusion and indorsement are special, for this or that to be done, &c. *Staunf. Prerog. c. 22.* See title *Monstrans de droit.*

By statute 13 C. 2. stat. 1. c. 5. the soliciting, labouring, or procuring the putting the hands or consent of above twenty persons to any Petition, to the King or either House of Parliament, for alterations in Church or State; unless by assent of three or more justices of peace of the county, or a majority of the Grand Jury, at the assises or sessions, &c. and repairing to the King or Parliament to deliver such Petition, with above the number of ten persons, is subject to a fine of 100*l.* and three months' imprisonment; being proved by two witnesses, within six months, in the court of B. R. or at the assises. See title *Liberty.*

To subscribe a Petition to the King, *to frighten him into a change of his measures, intimating that, if it be denied, many thousands of his subjects will be discontented*, &c. is included among the contempts against

the King's person and government, tending to weaken the same, and punishable by fine and imprisonment. 1 *Hawk. P. C. c.* 23. § 3.

By a temporary act, 36 *Geo. 3. c.* 7, (revived and continued by 41 *Geo. 3. (U. K.) c.* 30. for a term now expired) restrictions were put on tumultuous Petitions for alteration of matters established in Church or State.

PETITION IN CHANCERY, A request in writing, directed to the Lord Chancellor or Master of the Rolls, shewing some matter whereupon the petitioner prays somewhat to be granted him. *Pr. C.* 269.

Most things, which may be moved for of course, may be petitioned for.

Sometimes it is upon a collateral matter only, as it has relation to some precedent suit, or to an officer of the court; as to have a clerk or solicitor's bill taxed, or to oblige him to deliver up papers. *Pr. C.* 270.

The Master of the Rolls is not to be petitioned for rehearings, but the Chancellor; also the Chancellor only is to be petitioned touching pleas, demurrers, or exceptions, or touching decrees or special orders made before the Chancellor. In most cases of Petition, the Master of the Rolls may be applied to. *Pr. C.* 270. See 16 *Vin. Abr.* 337, 338: and this Dictionary, title *Chancery*.

PETITION OF RIGHT. An act, 3 *Car. 1. c.* 1. is thus called: by which it was provided, that none should be compelled to make or yield any gift, loan, benevolence, tax, and such like charge, without consent by act of Parliament; nor, upon refusal so to do, be called to make answer, take any oath not warranted by law, give attendance, or be confined, or otherwise molested concerning the same, &c. And that the Subject should not be burdened by the quartering of soldiers or mariners; and all commissions for proceeding by martial law, to be annulled, and none of like nature to be issued, lest the Subject (by colour thereof) be destroyed or put to death, contrary to the laws of the land, &c. See title *Liberty*.

PETIT CAPE; See *Cape*.

PETIT LARCENY; see *Larceny*.

PETIT SERJEANTY, *Parva serjeantia*.] To hold by *Petit Serjeanty* is, to hold lands or tenements of the King, yielding him a knife, a buckler, an arrow, a bow without a string, or other like service, at the will of the first feoffor: and there belongs not to it ward, marriage, or relief. None can hold by Grand or Petit Serjeanty, but of the King. But see *stat. 12 Car. 2. c.* 24. for the abolition of tenures; and this Dictionary, title *Serjeanty, Tenures*.

PETIT SESSION. In both corporations and counties at large, there is sometimes kept a Special or Petty Sessions, by a few Justices, for dispatching smaller business in the neighbourhood between the times of the General Sessions; as, for licencing alehouses, passing the accounts of parish officers, and the like. See *Justices of the Peace; Sessions*.

PETIT TREASON, *Parva Proditio*.] See *Treason*. Treason of a lesser kind; for as High Treason is an offence against the security of the commonwealth, so is Petit Treason though not so expressly: Petit Treason is, if a servant kills his master, a wife her husband, a secular or religious man his prelate. *Stat. 25 Ed. 3. stat. 5. c.* 2. See titles *Treason; Homicide III.* 4.

PETRA, A stone weight; See *Stone. Cowell*.

PETRARIA, Is sometimes taken for a quarry of stones, and in

other places for a great gun called *Petrard*: it is often mentioned in old records and historians in both senses. *Cowell*.

PEWS, In a church, are somewhat in the nature of an heir-loom; and may descend by immemorial custom, without any ecclesiastical concurrence, from the ancestor to the heir. 3 *Inst.* 202: 12 *Repl.* 105: 2 *Comm.* 429.

The right to sit in a particular pew in the church arises either from prescription as appurtenant to a messuage; or from a faculty or grant from the Ordinary, for he has the disposition of all Pews which are not claimed by prescription. *Gibs. Cod.* 221.

In an action upon the case for a disturbance of the enjoyment of a Pew, (trespass will not lie,) if the plaintiff claims it by prescription, he must state it in the declaration as appurtenant to a messuage in the parish: and then such prescription may be supported by an enjoyment for 36 years; and perhaps for any time above 20 years. 1 *Term Repl.* 428. So uninterrupted possession of a Pew in the church for 30 years, unexplained, is presumptive evidence of a prescriptive right to the Pew in an action against a wrong-doer: but may be rebutted by proof, that prior to that time the Pew had no existence. 5 *Term Repl.* K. B. 297.

As to *Faculties* for a Pew. See 1 *Term Repl.* K. B. 430. 1 *Wils.* 326.

PHAROS, from *Pharus*, a small island in the mouth of the Nile, wherein stood a high watch-tower.] A watch tower or seamark: No man can erect a *Pharos*, light-house, beacon, &c. without lawful warrant and authority. 3 *Inst.* 204. See title *Beacon*.

PHILOSOPHER'S STONE. Henry VI. granted letters patent to certain persons, who undertook to find out the Philosopher's Stone, and to change other metals into gold, &c. to be free from the penalty of the *stat.* 5 *Hen.* 4. c. 4; made against the attempts of *Chemists* of this nature. *Stat.* 34 *Hen.* 6: 3 *Inst.* 74. See *Multiplication of Gold and Silver*.

PHYSICIANS. No person within *London*, or seven miles thereof, shall practice as a Physician or surgeon, without licence from the Bishop of *London*, or Dean of *St. Paul's*; who are to call to their assistance four doctors of physic, on examination of the persons, before granted: and in the country, without licence from the Bishop of the diocese, on pain of forfeiting 5*l.* a month. *Stat.* 3 *H.* 8. c. 11.

The charter for incorporating the College of Physicians is confirmed; they have power to choose a president, and have perpetual succession, a common seal, ability to purchase lands, &c. Eight of the chiefs of the College are to be called Elects, who from among themselves shall choose a President yearly: and if any practise physic in the said city, or within seven miles of it, without licence of the College under their seal, he shall forfeit 5*l.* Also persons practising physic in other parts of *England*, are to have letters testimonial from the President and three Elects, unless they be graduate Physicians of *Oxford* or *Cambridge*, &c. *stat.* 14 & 15 *Hen.* 8. c. 5. confirmed and enlarged by *stat.* 1 *Mary*, *stat.* 2. c. 9.

The *stat.* 32 *H.* 8. c. 40. ordains that four Physicians (called Censors) shall be yearly chosen by the College, to search apothecaries' wares, and have an oath given them for that purpose by the president; apothecaries denying them entrance into their houses, &c. incur a forfeiture of 5*l.* And Physicians refusing to make the search are liable to a penalty of 40*s.* And every member of the College of Physicians is authorised to practise surgery.

In the case of *Dr. Bonham*, 7 *Jac.* 1. is shewn the power of the College of Physicians, in punishing persons for practising physic without licence; they imprisoned the Doctor for practising without licence; but it was adjudged that they could not lawfully do it, for in such case they had no power by the statute to commit, but they ought to sue for the penalty of *5l. per month, qui tam, &c.* But in case of mal-practice, the Censors have power to commit, for they may in such case fine and imprison by their charter, and they are judges of record, and not liable to an action for what they do by virtue of their judicial power. 8 *Rep.* 107: *Carth.* 494.

It hath been solemnly resolved, that *mala praxis* in a Physician, surgeon, or apothecary, is a great misdemeanor and offence at Common Law; whether it be for curiosity or experiment, or by neglect: because it breaks the trust which the party had placed in his Physician, and tends to the patient's destruction. *Ld. Raym.* 214.

If an Apothecary takes upon him to administer physic, without advice of a doctor, this has been adjudged practising physic within the statutes; though no fee was given the apothecary. 2 *Sulk.* 451. But this judgment was afterwards reversed in the House of Lords. *Mod. Cas.* 44. See *Bro. P. C.* title *Physicians*.

It has been holden, that if a person, not duly authorised to be a Physician or surgeon, undertakes a cure, and the patient dies under his hands, he is guilty of felony; but it is said not to be excluded the benefit of clergy. 1 *Hawk. P. C. c.* 31. § 62.

If a Physician or surgeon gives his patient a potion or plaster to cure him, which, contrary to expectation, kills him, this is neither murder nor manslaughter, but misadventure; and he shall not be punished criminally, however liable he might formerly have been to a civil action for neglect or ignorance; *Mirr. c.* 4. § 16: but it hath been holden that if it be not a *regular* Physician or surgeon who administers the medicine, or performs the operation, it is manslaughter at the least. *Britt. c.* 5: 4 *Inst.* 251. Yet Sir Matthew Hale very justly questions the law of this determination. 1 *Hal. P. C.* 430. See 4 *Comm. c.* 14. *f.* 197: and this Dictionary, title *Homicide*.

One who has taken his degree of Doctor of physic in either of the Universities, may not practise in *London*, and within seven miles of the same, without licence from the College of Physicians; by reason of the charter of incorporation, confirmed by *stat.* 14 & 15 *Hen.* 8. *c.* 5. penned in *very* strong and *negative* words. As to the testimonials granted by the Universities on a person's taking the Doctor's degree, these may have the nature of a recommendation, and give a man a fair reputation, but confer no right; consequently those statutes which have confirmed the privileges of the Universities would revive or confirm nothing but the reputation that this testimonial might give such graduates. And as to the last clause of this statute, that "none shall practise in the country without licence from the President and three Elects, unless he be a graduate of one of the Universities," all the inference from that would be, that possibly two licences may be necessary where a person is not a graduate. In the case of *Dr. Levet*, Lord Ch. J. *Holt* did not think this question worth being found specially. The college of Physicians, without doubt, are more competent judges of the qualifications of a Physician than the Universities; and there may be many reasons for taking particular care of those who practise physic in *London*. 10 *Mod.* 353, 354.

A Doctor of physic, who has been licenced by the College of Physicians, to practise physic in *London*, and within 7 miles, cannot claim as a matter of right to be examined by the College in order to his being admitted a Fellow of the College. 7 *Term Rep. K. B.* 282.

A Physician cannot maintain an action for his fees. 4 *Term Rep. K. B.* 317. See title *Fees*.

PICARDS, A sort of boats, of fifteen tons or upwards, used on the river *Severn*, mentioned in an antient *stat.* 34 & 35 *H. 8. c. 3.* Also a fisher-boat, mentioned in *stat.* 13 *Eliz. c. 11.*

PICCAGE, *piccagium*, from the Fr. *piquer*, i. e. *effodere*.] A consideration, paid for the breaking up ground to set up booths, stalls or standings, in fairs; payable to the lord of the soil.

PICKERY. The stealing of trifles which is liable to arbitrary punishment. *Scotch Dict.*

PICLE, *picellum*.] a small parcel of land inclosed with a hedge; a little close: this word seems to come from the *Italian* *picciola*, i. e. *parvus*; and in some parts of *England* it is called *Pightel*.

PIE POWDER COURT; *Curiâ pedis pulverizati*, from the French *pied*, *pes*, and *poudreux*, *pulverulentus*.] A Court held (*de hora in horam*) in fairs, to administer justice to buyers and sellers, and for redress of disorders committed in them. See Court of *Pie-powders*; and 7 *Vin*.

Skene, de verbor. signif., verbo *Pes-pulverosus*, says, the word signifies a vagabond; especially a pedlar, who hath no dwelling, therefore must have justice summarily administered to him, viz. within three ebbings and three flowings of the sea. *Bracton, lib. 5. tract. 1. c. 6. num. 6.* calleth it *Justitiam pefoudrous*. Of this Court, read the *stat.* 17 *Ed. 4. c. 2: 4 Inst.* 272: and *Cromp. Jur.* 221. This, among our old Saxons, was called *ceapung-gemot*, i. e. a court of merchandise, or handling matters of buying and selling. It is mentioned in *Doctor and Student, c. 5.* which says, it is a court incident to fairs and markets, to be held *only* during the time that the fairs are kept. *Cowell*.

The fair of *St. Giles*, held on the hill of that name, near the city of *Winchester*, by virtue of letters patent of *K. Edw. IV.* hath a court of *Pie-powder* of a transcendent jurisdiction; the judges whereof are called *Justices of the Pavilion*, and have their power from the Bishop of *Winchester*. See title *Justices of the Pavilion*.

PIER, Fr. *Perre*, saxum; from the materials of which it is composed.] A fortress made against the force of the sea or great rivers, for the better security of ships that lie at harbour in any haven. See title *Harbours*. Pierage is the duty for maintaining such Piers and harbours.

PIES, *Freres-pies*, Were a sort of monks; so called because they wore black and white garments, like magpies. They are mentioned by *Walsingham, p.* 124.

PIETANTIA; }
PIETANTIARIUS; } See *Pittance*.

PIG OF LEAD; See *Fother*.

PIGEONS. Every person who shall shoot at, kill, or destroy a Pigeon, may be committed to the common gaol for three months, by two or more justices of the peace, or he shall pay 20s. to the poor of the parish. *Stat. 1 Jac. 1. c. 27.* By *stat. 2 Geo. 3, c. 29*, any person who shall wilfully shoot at or destroy any house-doves or Pigeons

belonging to other persons, shall forfeit on conviction 20*s.* to the prosecutor; and if not forthwith paid, the offender may be committed and kept to hard labour for any time not exceeding three months, nor less than one month, unless the forfeiture be sooner paid: the owners of dove-cotes or other places built for the preservation or breeding of Pigeons, and those appointed by them, excepted. Offender is liable only to one conviction for same offence; and prosecutions are to be commenced and carried on with effect, within two months after the offence; and where persons suffer imprisonment, they are not liable afterwards to pay the penalty. This act appears to supersede the *Scotch Act*, 1571, c. 84, by which the third offence there is punishable capitally.—To steal wild Pigeons in a Pigeon-house, shut up so that the owner may take them, is *felony*. 1 *Hawk. P. C. c.* 33. § 26.

PIGEON-HOUSE, A place for safe-keeping Pigeons. A lord of a manor may build a Pigeon-house or Dove-cote upon his land, parcel of the manor; but a tenant of the manor cannot, without the lord's licence. 3 *Salk.* 148. Formerly none but the lord of the manor, or the parson, might erect a Pigeon-house; though it has been since held, that any *freeholder* may build a Pigeon-house on his own ground. 5 *Rep.* 104: *Cro. Eliz.* 548: *Cro. Jac.* 382, 440: A person may have a Pigeon-house, or Dove-cote, by prescription. See title *Nuisance* I.

PILA, That side of *money* which was called *file*, because it was the side on which there was an impression of a church built on *piles*;—He who brings an appeal of robbery against another, must shew the certain quantity, quality, price, weight, &c. *valorem* & *pilum*, where *pilum* signifies *figuram monetæ*. *Fleta, lib.* 1. c. 39.

PILETTUS, Antiently used for an arrow, which had a round knob, a little above the head, to hinder it from going far into a mark; from the Lat. *pila*, which signifies generally any round thing like a ball.—*Et quod forestarii non portabunt sagittas barbata, sed piletas.* *Chart.* 31 *H.* 3. Persons might shoot without the bounds of a *forest* with sharp or pointed arrows; but within the forest, for the preservation of the deer, they were to shoot only with blunts, bolts, or piles; and *sagitta pileta* was opposed to *sagitta barbata*; as *blunts* to *sharp*s, in rapiers. *Mat. Paris.*

PILEUS SUPPORTATIONIS, A cap of maintenance. Pope *Julius* sent such a cap, with a sword, to *Hen. VIII.* anno 1514. *Holling.* 827. Mention of such a cap is made by *Hovedon*, p. 656, at the coronation of *Richard* the First. *Cowell.*

PILLORY, *collistrigium*, *collum stringens*; *pilloria* from the Fr. *pilleur*, i. e. *defeculator*; or *pietori* derived from the Greek Πύλη, *janua*, a door, because one standing on the pillory, puts his head, as it were, through a door, and Οράω, *video*.] An engine made of wood, to punish offenders, by exposing them to public view, and rendering them infamous. By the *statute of the pillory*, 51 *H.* 3. *stat.* 6. it is appointed for bakers, forestallers, and those who use false weights, perjury, forgery, &c. 3 *Inst.* 219. Lords of leets are to have a Pillory and tumbrel, or it will be cause of forfeiture of the leet; and a vill may be bound by prescription to provide a Pillory, &c. 2 *Hawk. P. C. c.* 11. § 5.

PILOT, He who hath the government of a ship, under the master.

By 48 *Geo. 3. c. 104.* for the better regulation of Pilots, and of the pilotage of ships and vessels navigating the *British Seas*, regulations are made for licencing Pilots by the Corporation of the *Trinity House of Deptford Strand*; and penalties are imposed on Pilots misconducting themselves: not only such as are under the government of the *Trinity House*, but such also as are licenced by any Corporation having that power, which is conferred in various places by divers local acts. All former acts, relating to the *Cinque Port Pilots*, are by this act of 48 *Geo. 3.* repealed. Rates of pilotage are ascertained by this, and the various local acts for the respective ports and places.

As to Pilots in *Ireland*, see the *Irish Act*, 27 *Geo. 3. c. 25. § 9, 10.*

The *Laws of Oleron* ordain, That if any Pilot designedly misguide a ship, that it may be cast away, he shall be put to a rigorous death, and hung in chains: and if the lord of the place where a ship be thus lost, abet such villains, in order to have a share in the wreck, he shall be apprehended, and all his goods forfeited for the satisfaction of the persons suffering; and his person shall be fastened to a stake in the midst of his own mansion, which being fired on the four corners, shall be burnt to the ground and he with it. *Leg. Ol. c. 25.* It hath been said if the fault of a Pilot be so notorious, that the ship's crew see an apparent wreck, they may lead him to the hatches and strike off his head; but the Common Law denies this hasty execution: An ignorant Pilot is sentenced to pass thrice under the ship's keel by the laws of *Denmark. Lex Mercat. 70.*

Before the ship arrives at her place or bed, while she is under the charge of the Pilot, if she or her goods perish, or be spoiled, the Pilot shall make good the same: but after the ship is brought to the harbour, then the *Master* is to take charge of her, and answer all damages, except that of the act of God, &c. *Leg. Ol. cap. 23.*

In charter parties of affreightment, the master generally covenants to find a Pilot, and the merchant to pay him: And in case the ship shall miscarry through the insufficiency of the Pilot, the merchant may charge either the master or the Pilot; and if he charges the master, such master must have his remedy against the Pilot. *Lex Mercat. 70: See Lodemenage.*

PIMP-TENURE—Willielmus Hoppeshor tenet dimidiam virgatam terre in Rockhampton, de domino rege, per servitium custodiendi sex demisellas, scil. meretrices ad usum Dom. Reg. 12 Ed. 1. viz. by *Pimp-Tenure*. Blount's Ten. 39.

PINENDEN; See *Sharnburn*.

PINNAS BIBERE, or, *Ad pinnas bibere*. The old custom of drinking brought in by the *Danes* was to fix a pin in the side of the wassal bowl, and to drink exactly to the pin; as now is practised in a sealed glass, &c. This kind of drunkenness was forbid the clergy, in the council at *London*, anno 1102. *Cowell*.

PIPE, *Pipa*.] A roll in the Exchequer, otherwise called *The Great Roll*, anno 37 *E. 3. c. 4.* See *Clerk of the Pipe*. A Pipe of wine is a measure, containing two hogsheads, or half a ton, that is one hundred and twenty-six gallons; mentioned in *stat. 1 R. 3. c. 13.*

PIQUANT, A *French* word for sharp, made use of to express malice or rancour against any one. *Law Fr. Dict.*

PIRATES, *Pirata*.] Common sea rovers, without any fixed place of residence, who acknowledge no sovereign and no law, and support themselves by pillage and depredations at sea: but there are instan-

ces wherein the word *firata* has been formerly taken for a sea captain. *Spelm.*

The offence of **PIRACY**, by Common Law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed on land, would have amounted to felony there. 1 *Hawk. P. C. c. 37. § 10.*

The *stat. 11 & 12 W. 3. c. 7.* (made perpetual by *stat. 6 Geo. 1. c. 19.*) enact, That all Piracies, committed on the sea, or in any haven, &c. where the Admiral hath jurisdiction, may be tried at sea, or on the land, in any of his Majesty's islands, &c. abroad, appointed for that purpose, by commission under the Great Seal, or seal of the Admiralty, directed to such commissioners as the King shall think fit; who may commit the offenders, and call a Court of Admiralty, consisting of *seven persons at least*, or for want of seven, any three of the commissioners may call others; and the persons so assembled may proceed according to the course of the Admiralty, pass sentence of death, and order execution, &c. And commissions for trial of offences within the *Cinque Ports*, shall be directed to the Warden of the *Cinque Ports*, and the trial to be by the inhabitants of the port. And if any natural born subjects, or denizens, shall commit Piracy against any of his Majesty's subjects at sea, under colour of any commission from any foreign prince, they shall be adjudged Pirates: if any master of a ship, or seaman, give up the ship to Pirates, or combine to yield up, or run away with any ship; or any seaman lay violent hands on his commander, or endeavour a revolt in the ship, he shall be adjudged a Pirate, and suffer accordingly; also, if any person discover a combination for running away with a ship, he shall be entitled to a reward of 10*l.* for every vessel of 100 tons, and 15*l.* if above: and all persons who set forth any Pirate, or be assisting to those committing Piracy, or that conceal such Pirates, or receive any vessel or goods piratically taken, shall be deemed accessory to the Piracy, and suffer as principals. The *stat. 4 Geo. 1. c. 11.*, expressly excludes the principal from the benefit of clergy; and provides, that offenders under *stat. 11 & 12 W. 3.* may be tried and judged according to the form of *stat. 28 H. 8. c. 15.* See as to *Ireland*, the Irish acts, 11 *Jac. 1. c. 2:* 13, 14 *Geo. 3. c. 16:* 23, 24 *Geo. 3. c. 14.*

By *stat. 8 Geo. 1. c. 24.* (made perpetual by *stat. 2 Geo. 2. c. 28.*) the trading with known Pirates, or furnishing them with stores or ammunition, or fitting out any vessel for that purpose, or in anywise consulting, combining, confederating, or corresponding with them, or the forcibly boarding any merchant vessel, though without seizing or carrying her off, and destroying or throwing overboard any of the goods, shall be deemed Piracy; triable according to the *stats. 28 H. 8. c. 15:* 11 & 12 *W. 3. c. 7.* and such accessories to Piracy as are described by the *stat. 11 & 12 W. 3.* are declared to be principal Pirates; and all Pirates convicted by virtue of this act, are made felons without benefit of clergy.—Ships fitted out with a design to trade with Pirates, and the goods therein, shall be forfeited.—By several statutes (and see *stat. 22 & 23 C. 2. c. 11.*, and this Dict. tit. *Seamen*) to encourage the defence of merchant vessels against Pirates, the commanders and seamen wounded, and the widows of such seamen as are slain in any piratical engagement, shall be entitled to a bounty, to be divided among them, not exceeding two *per cent.* or

one fiftieth part of the value of the cargo on board; and such wounded seamen shall be entitled to the pension of *Greenwich Hospital*, which no other seamen are, except such have served in a ship of war. And if the commander, officers, or mariners shall behave cowardly, by not defending the ship, if she carries guns or arms; or shall discourage the other officers or mariners from fighting, so that the ship falls into the hands of Pirates; such commander, officer, or mariner shall forfeit all his wages, and suffer six months' imprisonment.

By *stat. 18 Geo. 2. c. 30*, any natural born subject or denizen, who, during any war, shall commit hostilities on the sea against any of his Majesty's subjects, by colour of any commission from the enemy, or adhere, or give aid to the enemy upon the sea, may be tried as a Pirate, in the Court of *Admiralty*, on ship-board or on land, and being convicted shall suffer death, &c. as other pirates, &c. But persons, convicted on this act, shall not be tried for the same crime as for High Treason; but if not tried on this act, may be tried for High Treason on the *stat. 28 H. 8. c. 15*.—The adherence to the King's enemies was thought to make the offence High Treason; this statute was made therefore to remove the doubt. Vide *Staund. P. C. 10: 3 Inst. 112: 2 Hale's Hist. P. C. 369, 370: 1 Hawk. P. C. c. 37, § 21*.

The crime of PIRACY, or robbery and depredation upon the HIGH SEAS, is an offence against the universal law of society; a Pirate being, according to *Coke, hostis humani generis, 3 Inst. 113*. As therefore he hath renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: so that every community hath a right, by the rule of self defence, to inflict that punishment upon him, which every individual would in a state of nature have been otherwise entitled to do for any invasion of his person or personal property. 4 *Comm. 71*.

Pirates are enemies to all: they are denied succour by the law of nations; and by the Civil Law, a ransom promised to a Pirate, if not complied with, creates no wrong; for the law of arms is not communicated to such; neither are they capable of enjoying that privilege, which lawful enemies are entitled to in the caption of another. *Lex Mercat. 183*. If a Pirate enters a port or haven, and assaults and robs a merchant ship at anchor there, this is not Piracy, because it is not done upon the *High Sea*; but it is a robbery at the *Common Law*, the act being *infra corpus comitatûs*: and if the crime be committed either *super antum mare*, or in great rivers within the realm, which are looked upon as common highways, there it is Piracy. *Moor 756*.

It has been held, that Piracy, being an offence by the Civil Law only, shall not be included in a statute speaking generally of felonies, as to benefit of clergy, &c. which shall be construed only of those felonies which are such by our law; as those Piracies are which are committed in a port or creek, within the body of a county. 2 *Hawk. P. C. c. 33, § 41*. See title *Clergy, Benefit of*.

If a ship be riding at anchor at sea, and the mariners part in their ship-boat, and the rest on shore, so that none are left in the ship; and a Pirate attack her, and commits a robbery, it is Piracy. 14 *Ed. 3*. And where a Pirate assaults a ship, and only takes away some of the men in order to sell them for slaves; this is Piracy: and if a Pirate make an attack on a ship, and the master, for the redemption, is com-

pelled to give his oath to pay a certain sum of money, though there be no taking, the same is Piracy by the Marine Law; but, by the Common Law, there must be *an actual taking*, as in case of robbery on the highway. *Lex Mercat.* 185. But the taking by a ship at sea, in great necessity, of victuals, cables, ropes, &c. out of another ship, is no Piracy; *if that other ship can spare them*, and paying or giving security therefor. *Ibid.* 183.

A Pirate takes goods upon the sea, and sells them, the property is not altered, no more than if a thief on land had stolen and sold them. See *stat. 27 Ed. 3. stat. 2. cap. 13: Godb.* 193. Yet, by the laws of *England*, if a man commit Piracy upon the subjects of any other prince, (at enmity with *England*,) and brings the goods into *England*, and sells them in a *market-overt*, the same shall be binding, and the owners be concluded. *Hob.* 79.

When goods are taken by a Pirate, and afterwards the Pirate, making an attack upon another ship, is conquered and taken by the other, by the Law Marine the Admiral may make restitution of the goods to the owners, if they are fellow-subjects of the captors, or belong to any state in amity with his Sovereign, on paying the costs and charges, and making the captor an equitable consideration for his service, *Lex Mercat.* 184. If a Pirate at sea assault a ship, and in the engagement kills a person in the other ship, by the Common Law, all the persons on board the Pirate ship are principals in the murder, although none enter the other ship; but, by the Marine Law, they who give the wound only shall be principals, and the rest accessaries, if the parties can be known. *Yelv.* 135. It has been holden, that there cannot be an accessary in Piracy; but if it happens, that there is an accessary upon the sea, such accessary may be punished by the Civil Law before the Lord admiral: and it was made a doubt, whether an accessary at land to a felony at sea, was triable by the Admiral, within the purview of *stat. 28 H. 8. c. 15.* Though this is settled by *stat. 11 and 12 W. 3. c. 7;* which provides that accessaries to Piracy, before or after, shall be inquired of, tried, and adjudged according to the said statute. *2 Hawk. P. C. c. 25. § 46.* See *post.*

In case the subjects of a prince, in *enmity* with the crown of *England*, enter themselves sailors on board an *English* Pirate, and a robbery is committed by them, who are afterwards taken; it is felony in the *English*, but not in the strangers: but in ancient times it was petit treason in the *English*, and felony in the strangers: And if any *Englishman* commits Piracy upon the subjects of any prince or state in *amity* with *England*, they are within the statute *28 H. 8. c. 15.* If the subjects of any nation or kingdom, in *amity* with *England*, shall commit a Piracy on the ships or goods of the *English*, the same is felony, and punishable by this statute: and Piracy committed by the subjects of *France*, or any other country in *friendship* with us, upon the *British* seas, is properly punishable by the Crown of *England* only. *Lex Mercat.* 186, 187: *1 Hawk. P. C. c. 37. § 1 in n.*

A Piracy is attempted on the ocean, if the Pirates are overcome, the takers may immediately inflict a punishment by hanging them up at the main-yard end; though this is understood *where no legal judgment may be obtained*; hence if a ship, on a voyage to any part of *America*, or the Plantations there, on a discovery of those parts, is attacked by a Pirate, but in the attempt the Pirate is overcome; the Pirates may be forthwith executed, without any solemnity of condemnation, by the Marine Law. *Lex Mercat.* 184.

By the ancient Common Law, Piracy, if committed by a subject, was held to be a species of treason, being contrary to his natural allegiance; and, by an alien, to be felony only: but now, since the statute of treasons, 25 *Ed. 3. c. 2*, it is held to be only felony in a subject. 3 *Inst.* 113. See *ante*.

Formerly this crime was only cognizable by the Admiralty Courts, which proceed by the rules of the Civil Law. But, it being inconsistent with the liberties of the nation, that any man's life should be taken away, unless by the judgment of his peers, or the Common Law of the land, the statute 28 *Hen. 8. c. 15*, established a new jurisdiction for this purpose; which proceeds according to the course of the Common Law. 4 *Comm.* 71.

By this *stat. 28 Hen. 8. c. 15*, all felonies, robberies, and murders committed by Pirates, shall be inquired of, heard and determined in any county of *England*, by the King's commission of *oyer and terminer*, as if the offences had been committed on land; and such commission shall be directed to the Lord Admiral, and other persons, as shall be named by the Lord Chancellor, who shall determine such offences, after the common course of the laws of the kingdom, used for felonies and robberies, &c. and award judgment and execution as against felons for any felony done on the land; and the offenders shall suffer death, loss of lands and goods, as if they had been attainted of such offence committed on land, &c.

The Commissioners under the above act are the Admiral or his deputy, and three or four more, among whom two Common-Law Judges are usually appointed: the indictment being first found by a grand jury of 12 men, and afterwards tried by a petit jury: the Judge of the Admiralty presiding. See 4 *Comm. c. 19. ff. 268.* and title *Homicide III. 3.*

No attainer for this offence corrupts the blood, the statute mentioning only that the offender shall suffer death, loss of lands, &c. as if he were attainted of a felony at Common Law; but says not, that the blood shall be corrupted. 3 *Inst.* 112. And the offender is to be tried on the statute, to forfeit his lands, &c. which are not forfeited by the Civil Law. 1 *Lill. Abr.*

In the construction of this *stat. 28 H. 8. c. 15.* the following opinions have also been holden:

That it does not alter the nature of the offence, so as to make that, which was before a felony only by the Civil Law, now become a felony by the Common Law; for the offence must still be alleged as DONE UPON THE SEA, and is no way cognizable by the Common Law, but only by virtue of this statute; which, by ordaining that in some respects it shall have the like trial and punishment as are used for felony by Common Law, shall not be carried so far as to make it also agree with it in other particulars which are not mentioned; from hence it follows that this offence remains, as before, of a special nature, and that it shall not be included in a general pardon of all felonies. 3 *Inst.* 112; 2 *Hale's Hist. P. C.* 270; *Moor*, 756; *Co. Litt.* 391; 1 *Hawk. P. C. c. 37. § 6.*

From the same ground it follows, that no persons, in respect of this statute, be construed to be, or punished as accessaries to Piracy before or after, as they might have been, if it had been made felony by the statute; whereby all those would incidentally have been accessaries in the like cases in which they would have been accessaries to

a felony at Common Law; therefore accessories to Piracy, being neither expressly named in the statute, nor by construction included, remain as they were before, and were triable by the Civil Law, if their offences were committed on the sea; but on the land, by no law, until *stat. 11 & 12 W. 3. c. 7*, for *stat. 2 & 3 Ed. 6. c. 24*, which provides against accessories in one county to a felony in another, extends not to accessories to an offence committed in no county, but on the sea; but by *stat. 11 & 12 W. 3. c. 7*, they are triable in like manner as the principals are by *stat. 28 Hen. 8. c. 15: 3 Inst. 112: 1 Hawk. P. C. c. 37. § 7*. [But now, as has been already stated, accessories to Piracy are made principals, by *stat. 8 Geo. 1. c. 24*.]

It has been resolved, that an offender standing mute on an arraignment, by force of this statute, shall have judgment as in other cases; for the words of the statute, are, that a commission shall be directed, &c. to hear and determine such offences after the common course of the laws of the land. *3 Inst. 114: Dyer 241. pl. 49, 308. pl. 73*.

It hath been holden, that the indictment for this offence must allege the fact to be done *at sea*, and must have the words *felonice & piratice*; and that no offence is punishable by virtue of this act as Piracy, which would not have been felony if done on the land; consequently taking an enemy's ship, by an enemy, is not within the statute. *3 Inst. 112: 1 Roll. Rep. 175: 1 Hawk. P. C. c. 37*.

It is agreed, that this statute extends not to offences done in creeks or ports within the body of a county, because they are, and always were, cognizable by the Common Law. *Moor 756: 1 Roll. Rep. 175: 1 Hawk. P. C. c. 37*.

Piracies on the sea are always excepted out of the general pardons.

PIRATES' GOODS. In the patent to the Admiral, he has granted him *bona piratorum*: the proper Goods of Pirates only pass by this grant; and not piratical goods. So it is of a grant *de bonis felonum*; the grantee shall not have goods stolen, but the true and rightful owner. But the King shall have piratical goods, if the owner be not known. *10 Rep. 109: Dyer. 269: Jenk. Cent. 325*.

PISCARY, *Piscaria, vel privilegium piscandi*.] A right or liberty of fishing in the waters of another person. See title *Fishing, Right of*.

PISCENARIUS. A Fishmonger. *Pat. 1 E. 3. p. 3. m. 13*.

PIT, a whole wherein the Scots used to drown women thieves; and to say condemned to the pit, is as when we say condemned to the gallows. *Skene*.

PIT and GALLOWS; See *Furca et Fossa*.

PITCHING-PENCE, money (commonly a penny) paid for pitching, or setting down every bag of corn or pack of goods, in a fair or market.

PITTANCE; *Pietancia modicum*.] A little repast, or refection of fish or flesh, more than the common allowance; and *The Pittancer* was the officer who distributed this at certain appointed festivals. *Rot. Chart. ad Hospital. S. Salvator. Sancti Edmundi, &c. An. 1 Reg. Johan. p. 2: Lib. stat. Eccl. Sti. Pauli Lond. A. D. 1298*.

PLACARD, Fr. *plaquart*, Dutch *placcaert*.] Hath several significations: in *France*, it formerly signified a table, wherein laws, orders, &c. were written and hung up: in *Holland*, an edict or proclamation: also it signifies a writing of safe conduct; with us it is little used, but is mentioned as a licence to use certain games, &c. in the *stat. 2 & 3 P. & M. c. 9*; and see *stat. 33 H. 8. c. 6*.

PLACE, *Locus*.] Where a fact was committed, is to be alleged in appeals of death, indictments, &c. And *Place* is considerable in pleadings in some cases: where the law requires a thing to be set down in a *certain Place*, the party must, in his pleadings, say, it was done there. *Co. Lit.* 282. When one thing comes in the *Place* of another, it shall be said to be of the *same nature*; as in case of an exchange, &c. *Shep. Epit.* 700. See *Local*; *Pleading*.

PLACITA, Pleas, pleadings, or debates and trials at law. *Placita* is a word often mentioned in our histories, and law books; at first, it signifies the public assemblies of all degrees of men where the King presided, and they usually consulted upon the great affairs of the kingdom; and these were called *generalia Placita*; because *generalitas universorum majorum tam clericorum quam alicorum ibidem conveniebat*: this was the custom in *France*, as well as here, as we are told by *Bertinian*, in his *Annals of France*, in the year 767. Some of our historians, as *Simeon of Durham*, and others, who wrote above 300 years afterwards, tell us, that those assemblies were held in the *open fields*; and that the *Placita generalia*, and *Curia Regis*, were what we now call a Parliament: it is true, the lords' courts were so called, viz. *Placita generalia*, but oftener *Curie generales*; because all their tenants and vassals were bound to appear there. See *Parliament*.

We also meet with *Placitum nominatum*; i. e. the day appointed for a criminal to appear and plead, and make his defence. *Leg. H.* 1. cc. 29. 46. 50.—*Placitum fractum*; i. e. when the day is past. *Leg. H.* 1. c. 59. Lord Coke says, that the word is derived from *placendo*, quia bene placitare super omnia placet; this seems to be a very fanciful derivation of the word; which appears rather to be derived from the German *plats*, or from the Latin *plateis*, i. e. fields or streets, where these assemblies or courts were first held. But this word *Placita* did sometimes signify penalties, fines, mulcts, or emendations, according to *Gervase of Tilbury*, or the *Black-Book* in the Exchequer, lib. 2. tit. 13. *Placita autem dicimus penas pecuniarias in quas incidunt delinquentes*. So, in the laws of *Hen. 1. cap.* 12, 13.—Hence the old rule or custom, *Comes habet tertium denarium Placitorum*, is to be thus understood; the Earl of the county shall have the third part of the money due upon mulcts, fines, and amerciaments imposed in the assises and county courts. *Cowell*.

Placita is the style of the court at the beginning of the Record of *Nisi Prius*. *Tidd. K. B. c.* 37. In this sense, pleas, *Placita*, are divided, into *Pleas of the Crown*, and *Common Pleas*; *Pleas of the Crown* are all suits in the King's name, for offences committed against his crown and dignity, and also against the peace; *Common Pleas* are those that are agitated between common persons, in civil cases. *S. P. C. cap.* 1: 4 *Inst.* 10.

PLACITARE, i. e. *Litigare & causas agere*.] To plead: And the manner of pleading before the Conquest was, *Coram aldermanno & proceribus & coram hundredariis, &c.* *M. S. in Bibl. Cotton.*

PLACITATOR, A pleader: *Ralf Flambard* is recorded to be *totius regni Placitator*. *Temp. W. 2.* See *supra*; under title *Placita*.

PLAGII CRIMEN, The stealing of human creatures.—This in *Scotland*, was antiently punishable with death as a treasonable usurpation of the royal authority in detaining his Majesty's liege subjects. The same punishment has been applied to the stealing of chil-

dren in *Scotland*, of which there was an instance in the trial and condemnation of *Margaret Irvine*, 24 Sept. 1784. *Bell's Scotch Dict.*

PLAGUE, See *Quarantine*.

PLAINT, *Fr. plainte; Lat. querela.*] The exhibiting any action, in writing; and the party making his *Plaint* is called the *Plaintiff*. *Kitch.* 231. A *Plaint* in an inferior court is the entry of an action, after this manner: *A. B. complains of C. D. of a plea of trespass, &c. and there are pledges of prosecuting, that is to say, John Doe and Richard Roe.*

The first process in an inferior court is a *Plaint* which is in the nature of an original writ, because therein is briefly set forth the plaintiff's cause of action; and the Judge is bound, of common right, to administer Justice therein without any special mandate from the King. 3 *Comm. c.* 18. *p.* 273: And on this *plaint* there may issue a *pone*, till the return of a *nihil*, upon which a *capias* will lie against the body of the defendant. 2 *Lill. Abr.* 294.

Where a *plaint* is levied in an inferior court, the defendant must be first distrained for non-appearance, by something of small value; then, if he doth not appear, a farther distress is to be taken to a greater value and so on; if all his goods are distrained on the first distress, attachment may be issued out of *B. R.* against the officers, &c. 2 *Lill. Abr.* A plaintiff in an *assise* may abridge his *Plaint* of any part whereupon a bar is pleaded. 21 *Hen. 8. c.* 3. See further title *County Court*.

Plaint, in a *superior court*, is said to be the cause for which the plaintiff complains against the defendant; and for which he obtains the King's writ: For as the King denies his writ to none, if there be cause to grant it; so he grants not his writ to any, without there be cause alleged for it. 2 *Lill.* 294. See title *Original*.

PLASTERERS, Not to exercise the art of a painter in *London*. *Stat.* 1 *Jac. 1. c.* 20. See title *Painters*.

PLANCHIA, A plank of wood. *Cowell*.

PLANTATION, *Plantatio, Colonia.*] A place where people are sent to dwell; or a company of people transplanted from one place to another, with an allowance of land for their tillage. *Lit. Dict.*

Perhaps it may, more fully, if not accurately, be defined, A District, Settlement, or Colony; frequently a whole island in some foreign part, dependent on a mother country, with whose inhabitants it was originally peopled, or by whom it was conquered or acquired.

In glancing over the settlements on the coast of *Africa*, the settlements of the *East India Company* in *India*, the *China* trade, *Nootka Sound*, and many other places, we see lands and territories under very different circumstances, and dependent upon political considerations of infinite variety; respecting some of which it must be extremely difficult to determine whether they are within the statute 7 & 8 *Will. 3. c.* 22, (for regulating the Plantation trade,) as *Colonies* or *Plantations*; or indeed, which is a further doubt, whether they are within any part of the Act of Navigation, as lands, islands or territories to his Majesty *belonging*, or *in his possession*. These are questions of great importance to the Navigation system, and deserve a serious attention.

As to the terms *Colony* or *Plantation*, whatever distinction may at one time have been made between them, there seems now to be none at all. The word *Plantation* first came into use. The Plantations of *Ulster*, *Virginia*, *Maryland*, and other places, all implied the same idea of introducing, instituting, and establishing, where every thing

was desert before. *Colony* did not come much into use till the reign of *Charles II.* and it seems to have denoted the sort of political relation in which such Plantations stood to this kingdom. Thus the different parts of *New England* were, in a great measure, voluntary societies planted without the direction or participation of the *English* government; so that, in the time of *Charles II.* there were not wanting persons who pretended to doubt of their constitutional dependence upon the crown of *England*; and it was recommended, in order to put an end to such doubts, that the King should appoint governors, and so make them *Colonies*. A Colony therefore might be considered as a Plantation, when it had a governor and civil establishment, subordinate to the mother country. All the Plantations in *America*, except those of *New England*, had such an establishment, and they were, upon that idea, Colonies as well as Plantations. Those terms seem accordingly to be used without distinction in the *stat. 7 & 8 Will. 3*; and in those made afterwards. *Reeves's Law of Shipping, &c. p. 136, 138.—p. 123. et seq. and p. 521:—*and see title *Navigation Acts* in this Dictionary.

Plantations or Colonies, in distant countries, (says *Blackstone*,) are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest, or ceded by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of Colonies, with respect to the laws by which they are bound. For it hath been held, that if an uninhabited country be discovered and planted by *English* subjects, all the *English* laws then in being, which are the birth-right of every subject, are immediately there in force. *Salk. 411. 666: 3 Mod. 159: 4 Mod. 225, 6: 2 P. Wms. 75.* But this must be understood with very many, and very great, restrictions. Such Colonists carry with them only so much of the *English* law as is applicable to their own situation and the condition of an infant Colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue, (such especially as are enforced by penalties,) the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the revision and control of the King in Council: the whole of their constitution being also liable to be new-modelled and reformed by the general superintending power of the legislature in the mother country. But in conquered or ceded countries, that have already laws of their own, the King may indeed alter and change those laws: but, till he does actually change them, the ancient laws of the country remain in force; unless such as are against the law of God, as in the case of an infidel country. *7 Rep. 17: Calvin's Case: Show. Parl. C. 31.* See also, in the case of *Campbell v. Hall*, an elaborate argument of Lord *Mansfield*, to prove the King's legislative authority, by his prerogative alone, over a ceded or conquered country. *Cowp. 204.* Our *American* Plantations are principal-

ly of this latter sort, being obtained in the last century, either by right of conquest and driving out the natives, or by treaties. And therefore the common Law of *England*, as such, has no allowance or authority there; they being no part of the mother country, but distinct (though dependent) dominions. They are subject however to the control of the Parliament; though (like the Isle of *Man*, and the rest) not bound by any acts of Parliament, unless particularly named. 1 *Comm. Introd.* § 4. *h.* 108, 9.

With respect to their interior polity, our Colonies are stated by *Blackstone* to be properly of three sorts: 1. Provincial Establishments; the constitutions of which depend on the respective commissions issued by the Crown to the governors, and the instructions which usually accompany those commissions; under the authority of which, provincial assemblies are constituted, with the power of making local ordinances, not repugnant to the laws of *England*. 2. Proprietary governments; granted out by the Crown to individuals, in the nature of feudatory principalities, with all the inferior regalities, and subordinate powers of legislation, which formerly belonged to the owners of counties-palatine: yet still with these express conditions, that the ends for which the grant was made be substantially pursued, and that nothing be attempted which may derogate from the sovereignty of the mother country. 3. Charter Governments; in the nature of civil corporations, with the power of making bye-laws for their own interior regulation, not contrary to the laws of *England*; and with such rights and authorities as are specially given them in their several charters of incorporation. The form of government in most of them is borrowed from that of *England*. They have a governor named by the King, (or in some proprietary colonies by the proprietor,) who is his representative or deputy. They have courts of justice of their own, from whose decisions an appeal lies to the King and Council here in *England*. Their general assemblies, which are their House of Commons, together with their Council of State, being their Upper House, with the concurrence of the King or his representative, the Governor, make laws suited to their own emergencies. But it is particularly declared by *stat. 7 & 8 W. 3. c. 22.* that all laws, bye-laws, usages, and customs, which shall be in practice in any of the Plantations, repugnant to any law, made or to be made in this kingdom relative to the said Plantations, shall be utterly void and of none effect. And because several of the Colonies had claimed the sole and exclusive right of imposing taxes upon themselves, the statute 6 *Geo. 3. c. 12.* was passed expressly declaring that all his Majesty's Colonies and Plantations in *America* have been, are, and of right ought to be, subordinate to and dependent upon the Imperial Crown and Parliament of *Great Britain*; who have full power and authority to make laws and statutes of sufficient validity to bind the Colonies and people of *America*, subjects of the Crown of *Great Britain*, in all cases whatsoever. This authority was afterwards enforced, by *stat. 7 Geo. 3. c. 59.* for suspending the legislation of *New-York*; and by several subsequent statutes: but in the year 1782, by *stat. 22. Geo. 3. c. 46.* his Majesty was empowered to conclude a truce or peace with the Colonies of *New-Hampshire*, *Massachusetts-Bay*, *Rhode-Island*, *Connecticut*, *New-York*, *New-Jersey*, *Pennsylvania*, the *Three Lower Counties on Delaware*, *Maryland*, *Virginia*, *North Carolina*, *South Carolina*, and *Georgia*, in *North-America*; and for that purpose, to repeal,

or to suspend, the operation of any acts of Parliament so far as they related to the said Colonies. A peace was soon after concluded, and the independence, which the abovementioned colonies had before declared, was allowed to them, under the title of the *United States of America*. See this Dict. title *Navigation Acts*.

Stat. 5 Geo. 2. c. 7. regulates suits in the Courts of Law and Equity in the Plantations; and makes houses, lands, negroes, and real estates, assets to pay debts—*Stat. 13 Geo. 3. c. 14.* enforces mortgages of estates in the *West India Colonies*, and the mode of proceeding to foreclose the same.—*Stat. 22 Geo. 3. c. 75.* declares that offices in Plantations shall only be granted by patent, during the residence of the grantee and *quamdiu se bene gesserit*; and on absence or misbehaviour, the officer is removable by the Governor and Council, who may also give leave of absence.

By *stat. 11 & 12 Wil. 3. c. 12.* confirmed and extended by *42 Geo. 3. c. 85.* all offences committed by Governors of Plantations or any other persons in the execution of their offices, in any public service abroad, may be prosecuted in the Court of King's Bench in *England*. The indictment is to be laid in *Middlesex*; and the offenders are punishable as if the offence had been committed in *England*, and also incapacitated from holding any office under the Crown. The Court of K. B. is empowered to award a mandamus to any Court of Judicature, or to the Governor, &c. of the country where the offence was committed, to obtain proofs of the matter alleged: and the evidence is to be transmitted back to that Court, and there admitted on the trial. See further title *East India Company*.

As to the limits and government of the Province of *Quebec*, see *stats. 14 Geo. 3. c. 83: 31 Geo. 3. c. 31.*

Courts of Civil Jurisdiction in *Newfoundland* are established and regulated by *stat. 33 Geo. 3. c. 76:* continued by several subsequent acts.

A Court of Criminal Jurisdiction in *Norfolk Island*, on the eastern coast of *New South Wales*, whither felons are now transported, is established and regulated by *stats. 27 Geo. 3. c. 2: 34 Geo. 3. c. 45: 35 Geo. 3. c. 18.* See this Dict. title *Transportation*.

PLANTS, destroying, See title *Mischief, Malicious*; as to stealing plants, see *Larceny I. 1.*

PLATE, Vessels and utensils of gold and silver. By *stat. 29 Geo. 2. c. 14.* a tax was laid on all persons possessed of Plate; but that statute was repealed by *stat. 17 Geo. 3. c. 39.*

By *stat. 7 & 8 W. 3. c. 19. s. 3.* Public houses were prohibited from using plate. After this part of the act had lain dormant many years, a set of informers suddenly arose, and brought a number of actions for the penalties, forfeited by virtue of the act; whereupon many publicans raised a sum of money to pay the expence of a bill to repeal this clause, which they obtained by *stat. 9 Geo. 3. c. 11.* See title *Goldsmiths*.

PLAYHOUSE, *Playhouses* were originally instituted with a design of recommending virtue and exposing vice and folly; therefore are not in their own nature nuisances: but it hath been holden that a common *Playhouse* may be a nuisance, if it draw together great numbers of coaches, &c. as to prove generally inconvenient to the places adjacent. *5 Mod. 142.* See title *Nuisance*.

If any persons in *Plays*, &c. jestingly or profanely use the name of

God, they forfeit 10*l.* *Stat. 3 Jac. 1. c. 21.* And *Players* speaking any thing in derogation of the Book of Common Prayer, are liable to forfeitures and imprisonment. *Stat. 1 Eliz. c. 2. § 9.* Also acting *Plays* or interludes on a *Sunday* is subject to penalties, by *stat. 1 Car. 1. c. 1.* See title *Sunday*.

By *stat. 10 Geo. 2. c. 28.* No person shall act any new *Play* or addition to an old one, &c. unless a true copy thereof, signed by the master of the *Playhouse*, be sent to the Lord Chamberlain *fourteen days before acted*; who may prohibit the representing any stage *Play*; and persons acting contrary to such prohibition, forfeit 50*l.* and their licences, &c. And no licence is to be given to act *Plays*, but in the city and liberties of *Westminster*, or places of his Majesty's residence: But by *stat. 28 Geo. 3. c. 30.* the General or Quarter Sessions may licence Theatres in country towns and places, for 60 days at a time, under certain restrictions: and, by special Acts of Parliament, *Playhouses* are permitted to be erected in various places.

By the above *stat. 10 Geo. 2. c. 28.* Every actor for hire, (if he shall have no legal settlement where he acts,) without authority from the King or the Lord Chamberlain, shall be deemed a rogue and a vagabond, and be punished as such, or forfeit 50*l.*; and *Plays* acted in any place where liquors are sold, shall be deemed to be acted for hire.

Tumbling is not an entertainment of the stage within the meaning of this statute. 6 *Term Rep.* 286.

PLAYS and GAMES, See this Dict. titles *Gaming*; *Nuisance*.

PLEA, *Placitum*.] That which either party alleges for himself in court, in a cause there depending to be tried.

PLEADABLE BRIEFS, are precepts directed to the Sheriffs, who thereupon cite parties, and hear and determine; and this citation must be particular according to the old custom. *Scotch Dict.*

PLEADING in a large sense, contains all the proceedings from the declaration, till issue is joined; but is, in its immediate sense, taken for the defendant's answer to the declaration.

PLEADINGS are the mutual altercations between the plaintiff and defendant in a suit; which at present are set down and delivered into the proper office in writing; though formerly they were usually put in by their Counsel *ore tenus* or *viva voce* in open Court, and then minuted down by the chief clerks or prothonotaries: whence, in the old Law French, the Pleadings are frequently denominated the *parol*. 3 *Comm. c. 20.*

I. *The general Principles of Pleading, in Civil Cases in the Common Law Courts.*

1. *As to the Declaration, and other proceedings, previous to the Plea.*
2. *Of the Plea and other Proceedings, previous to the Issue.*
3. *Of the Issue and Record; of the Language of Pleadings; and of Repleader, &c.*
4. *The Practice of the Courts as to the Time and Manner of entering Pleas.*

II. *Of Pleadings in Criminal Cases; and see this Dict. titles Judgment (Criminal); Execution and Reprieve.*

[For the general Principles of Pleadings in Equity, see this Dictionary, titles *Chancery*; *Equity*.]

F. 1. IN THE DECLARATION, *Narratio* or Count, antiently called

the *tale*, the plaintiff sets forth his cause of complaint at length; being indeed only an amplification or exposition of the original writ upon which his action is founded, with the additional circumstances of time and place when and where the injury was committed.

It is generally usual in actions upon the case to set forth several cases, by different *counts*, in the same declaration; so that if the plaintiff fails in the proof of one, he may succeed in another. As, in an action on the case, upon an *assumpsit* for goods sold and delivered, the plaintiff usually counts or declares, first, upon a settled and agreed price between him and the defendant; as that they bargained for twenty pounds: and lest he should fail in the proof of this, he counts likewise upon a *quantum valebant*; that the defendant bought other goods, and agreed to pay him so much as they were reasonably worth; and then avers that they were worth other twenty pounds: and so on in three or four different shapes; and at last concludes with declaring, that the defendant had refused to fulfil any of these agreements, whereby he is endamaged to such a value. And if he proves the case laid in any one of his counts, though he fails in the rest, he shall recover proportionable damages. This declaration always concludes with these words, "and thereupon he brings *suit*," &c. "*inde producit sectam*," &c. By which words, *suit* or *secta* (*à sequendo*), were anti-ently understood the witnesses or followers of the plaintiff. *Seld. on Fortesc. c. 21*. For in former times the law would not put the defendant to the trouble of answering the charge, till the plaintiff had made out at least a probable case. *Bract. 400: Flet. l. 2. c. 6*. But the actual production of the *suit*, the *secta*, or *followers*, is now antiquated; and hath been totally disused, at least ever since the reign of *Edw. III.* though the form of it still continues. *3 Comm. c. 20*.

At the end of the declaration are added also the plaintiff's common pledge of prosecution, *John Doe* and *Richard Roe*, which are now mere names of form; though formerly they were of use to answer to the King for the amercement of the plaintiff, in case he were nonsuited, barred of his action, or had a verdict or judgment against him. *3 Bulstr. 275: 4 Inst. 189*. But now he is punished by payment of the costs. See this Dict. titles *Costs; Discontinuance of Process; Nonsuit; Pledges*.

A Declaration must be entitled of the Term when the writ is returnable, though in certain cases it need not actually be filed till the next term: so that in these latter cases the plaintiff cannot recover any demand arising after the term when the writ is returnable, though before the declaration is actually filed. *3 Term Rep. K. B. 624: and see 1 East's Rep. 133*.

When the plaintiff hath stated his case in the declaration, it is incumbent on the defendant within a reasonable time to make his *defence*, and to put in a *Plea*; else the plaintiff will at once recover judgment by *default* or *nihil dicit* of the defendant. See title *Judgment*.

As to the true meaning of this word *Defence*, and the nature of it in various actions, see this Dict. title *Defence*.

Before any defence made, however, if at all, *cognizance* of the suit must be *claimed* or demanded; when any person, or body corporate hath the franchise, not only of *holding*, *Pleas* within a particular limited jurisdiction, but also of the *cognizance of Pleas*: and that, either *without* any words exclusive of other courts, which entitles the lord of the franchise, whenever any suit that belongs to his jurisdiction

is commenced in the courts at *Westminster*, to demand the cognizance thereof; or *with* such exclusive words, which also entitle the defendant to plead to the jurisdiction of the court. 2 *Lord Raym.* 836: 10 *Mod.* 126. Upon this claim of cognizance, if allowed, all proceedings shall cease in the superior court, and the plaintiff is left at liberty to pursue his remedy in the special jurisdiction. It must be demanded before full defence is made, or imparlance prayed; for these are a submission to the jurisdiction of the superior court, and the delay is a *taches* in the lord of the franchise: and it will not be allowed, if it occasions a failure of justice, or if an action be brought against the person himself, who claims the franchise, unless he hath also a power in such case of making another judge. See *Rast. Ent.* 128: 2 *Ventr.* 363: *Hob.* 87; and this Dict. titles *Cognizance*; *Courts of the Universities*; and *post.* 4.

After defence made, the defendant must put in his Plea. But, before he defends, he is in certain cases entitled to demand one *imparlance* or *licentia loquendi*; and may, before he pleads; have more granted, by consent of the court; to see if he can end the matter amicably without further suit, by *talking* with the plaintiff; See this Dict. title *Imparlance* and *post.* 4. There are also many other previous steps which may be taken by a defendant before he puts in his Plea. He may, in real actions, demand a *view* of the thing in question, in order to ascertain its identity and other circumstances. See title *View*. He may crave *oyer* of the writ, or of the bond, or other specialty upon which the action is brought: that is, to *hear* it read to him. See title *Oyer*. In real actions also the tenant may pray in *aid*, or call for assistance of another, to help him to plead, because of the feebleness or imbecility of his own estate. Thus a tenant for life may pray in aid of him that hath the inheritance in remainder or reversion; and an incumbent may pray in aid of the Patron and Ordinary: that is, that they shall be joined in the action and help to defend the title. See title *Aid Prayer*. *Voucher* also is the calling in of some person to answer the action, that hath warranted the title to the tenant or defendant. This is still used in the form of common recoveries which are grounded on a writ of entry; a species of action that relies chiefly on the weakness of the tenant's title, who therefore vouches another person to warrant it; See title *Recovery*. In assises indeed, where the principal question is, whether the demandant or his ancestors were or were not in possession till the ouster happened; and the title of the tenant is little (if at all) discussed, there no voucher is allowed; but the tenant may bring a writ of *warrantia chartæ* against the warrantor, to compel him to assist him with a good Plea or defence, or else to render damages and the value of the land, if recovered against the tenant, *F. N. B.* 135: See title *Warrantia Chartæ*. In many real actions also, brought by or against an infant under the age of twenty-one years, and also in actions of debt brought against him, as heir to any deceased ancestor, either party may suggest the nonage of the infant, and pray that the proceedings may be deferred till his full age; or (in the legal phrase) that the infant may have his age, and that the *parol* may *demur*; that is, that the pleadings may be staid; and then they shall not proceed till his full age, unless it be apparent that he cannot be prejudiced thereby. *Dy.* 137: *Finch.* 1. 360. But, by the *stat. Westm.* 1. 3 *Edw.* 1. c. 46; *stat. Gloc.* 6 *Edw.* 1. c. 2. in writs of entry *sur disseisin* in some particular cases, and in actions ances-

tral brought by an infant, the parol shall not demur: otherwise he might be deforced of his whole property, and even want a maintenance, till he came of age. So likewise in a writ of dower the heir shall not have his age; for it is necessary that the widow's claim be immediately determined, else she may want a present subsistence. 1 *Roll. Abr.* 137. Nor shall an infant patron have it in a *quare impedit*, since the law holding it necessary and expedient that the church be immediately filled. 1 *Roll. Abr.* 138.

2. WHEN the proceedings above particularised are over, the defendant must then put in his excuse or Plea. Pleas are of two sorts; *dilatory* Pleas, and Pleas *to the action*. Dilatory Pleas are such as tend merely to delay or put off the suit, by questioning the propriety of the remedy, rather than by denying the injury: Pleas to the action are such as dispute the very cause of suit. The former cannot be pleaded after a general imparlance, which is an acknowledgment of the propriety of the action. See title *Imparlance*.

Pleas in bar may come after a continuance, or general imparlance; but if such Plea be first pleaded, the defendant shall not be admitted afterwards to plead in abatement of the writ, which is allowed to be good by pleading in bar to the action; yet *matter of record may be shewn in arrest of judgment*, and thereby the writ be abated. *Hob.* 280, 281.

In good order of pleading, a person ought to plead,

1st, *To the Jurisdiction of the Court.*

2dly, *To the Person of the Plaintiff; and next of the Defendant.*

3dly, *To the Writ.*

4thly, *To the Action of the Writ.*

5thly, *To the Count or Declaration.*

6thly, *To the Action itself, in bar thereof.*

A Plea to the *jurisdiction* is called a *foreign Plea*, because it alleges that the matter ought to be tried in another court, &c. and every such Plea ought to give some other Court by which the matter may be tried. 6 *East's Rep.* 583.

The Plea to the *Writ, &c.* is for variance between the writ and record, death of parties, misnomer, joint-tenancy, &c. and may be to the writ and bill, or count together.

Pleas to the count or declaration are variance between the writ and count; specialty of record; incertainty, &c. and all these are properly *Pleas in abatement*. See this Dict. title *Abatement*.

Plea to the action of the Writ is, where one pleadeth such matter which sheweth the plaintiff had no cause to have the writ brought. And a Plea in bar to the *action* itself is, when defendant pleadeth a Plea, which is sufficient to overthrow the action. *Kitch.* 95: *Lit.* 196. *Pleas in bar*, such as a release, the statute of limitations, agreement with satisfaction, &c. destroy the plaintiff's action forever: but *Pleas in abatement are temporary and dilatory*, and do not destroy the action, only *stop the cause for a while*, till the defect is removed. 2 *Lutw.* 1174.

Dilatory Pleas therefore are; To the *jurisdiction* of the court: alleging, that it ought not to hold Plea of this injury, it arising in *Wales* or beyond sea; or because the land in question is of antient demesne, and ought only to be demanded in the lord's court, &c. To the *disability* of the plaintiff, by reason whereof he is incapable to commence or continue the suit; as, that he is an alien enemy, outlawed, excom-

municated, attainted of treason or felony, under a *præmunire*, not in *rerum naturâ* (being only a fictitious person), an infant, a feme-covert, or (formerly) a monk professed. In *abatement*; which abatement is either of the writ, or the count, for some defect in one of them; as by misnomer of the defendant, giving him a wrong addition, or other want of form in any material respect. Indeed all dilatory Pleas are called Pleas in *abatement*, in contradistinction to pleas in *bar*. Or, it may be, that the plaintiff is dead; for the death of either party is generally an abatement of the suit in personal actions. See this Dict. title *Action*: and further title *Abatement* I. 6. c. Also he may plead in abatement another action depending of the same nature, for the same thing, &c. and if a person mistaking his first action, bring another action without discontinuing the first, this *Plea* may be pleaded. 1 *Salk.* 392. See title *Abatement*.

These Pleas in abatement were formerly very often used as mere dilatory Pleas, without any foundation of truth, and calculated only for delay; but now by *stat. 4 & 5 Ann. c. 16.* no dilatory Plea is to be admitted, without affidavit made of the truth thereof, or some probable matter shewn to the court to induce them to believe it true. And with respect to the Pleas themselves, it is a rule, that no exception shall be admitted against a declaration or writ, unless the defendant will in the same Plea give the plaintiff a better; that is, shew him how it might be amended; that there may not be two objections upon the same account. *Brownl.* 139. Neither, by *stat. 8 & 9 W. 3. c. 31.* shall any Plea in abatement be admitted in any suit for partition of lands; nor shall the same be abated by reason of the death of any tenant.

All Pleas to the jurisdiction conclude to the cognizance of the court; praying "judgment, whether the court will have further cognizance of the suit:" Pleas to the disability conclude to the person; by praying "judgment, if the said *A.* (the plaintiff) ought to be answered:" and Pleas in abatement begin "That the defendant ought not to answer," &c. and (when the suit is by original) conclude to the writ or declaration; by praying "judgment of the writ, or declaration, and that the same may be quashed," *cassetur*, made void, or abated: but, if the action be by bill, the Plea must pray "judgment of the bill," and not of the declaration; the bill being here the original, and the declaration only a copy of the bill. See title *Original*.

It has been resolved, that where a *Plea* is in abatement, if it be of necessity that the defendant must disclose matter of bar, he shall have his election to take it either by way of bar, or abatement. 2 *Mod.* 65.

When these dilatory Pleas are allowed, the cause is either dismissed from that jurisdiction; or the plaintiff is stayed till his disability be removed; or he is obliged to sue out a new writ, by leave obtained from the Court; or to amend and new-frame his declaration. But when, on the other hand, they are over-ruled as frivolous, the defendant has judgment of *respondeat ouster*, or to answer over in some better manner.

It is then incumbent on him to plead a *Plea to the action*; that is, to answer to the merits of the complaint. This is done by confessing or denying it.

A confession of the whole complaint is not very usual, for then the defendant would probably end the matter sooner: or not plead

at all, but suffer judgment to go by default. Yet sometimes, after tender and refusal of a debt, if the creditor harasses his debtor with an action, it then becomes necessary for the defendant to acknowledge the debt, and plead the tender; adding that he has always been ready, *tout temps prist*, and still is ready, *encore prist*, to discharge it. See title *Tender*. But frequently the defendant confesses one *part* of the complaint, (by a *cognovit actionem* in respect thereof,) and traverses or denies the rest: in order to avoid the expence of carrying that part to a formal trial, which he has no ground to litigate. A species of this sort of confession is the *payment of money into court*; which is for the most part necessary upon pleading a tender, and is itself a kind of tender to the plaintiff; by paying into the hands of the proper officer of the court as much as the defendant acknowledges to be due, together with the costs hitherto incurred, in order to prevent the expence of any farther proceedings. See title *Money into Court*. To this head may also be referred the practice of what is called a *Set-off*, whereby the defendant acknowledges the justice of the plaintiff's demand on the one hand; but, on the other, sets up a demand of his own, to counterbalance that of the plaintiff either in the whole or in part. See title *Set-off*.

Pleas that totally deny the cause of complaint, are either the *general issue*, or a *special Plea*, in bar.

The *general Issue* or general Plea is, what traverses, thwarts, and denies at once the whole declaration; without offering any special matter whereby to evade it. As in trespass either *vi et armis*, or on the case, *Not guilty* in debt upon contract, *nihil (nil) debet*, "he owes nothing;" in debt on bond, *non est factum*, "it is not his deed;" or an *assumpsit*, *non assumpsit*, "he made no such promise." Or in real actions, *nul tort*, "no wrong done;" *nul disseisin*, "no disseisin;" and in a writ of right, the mise or issue is, that the tenant has more right to hold than the demandant has to demand. These Pleas are called the general issue; because, by importing an absolute and general denial of what is alleged in the declaration, they amount at once to an issue; by which is meant a fact affirmed on one side and denied on the other. See further this Dict. title *Issue*.

Formerly the general issue was seldom pleaded, except when the party meant wholly to deny the charge alleged against him. But when he meant to distinguish away or palliate the charge, it was always usual to set forth the particular facts in what is called a *special Plea*; which was originally intended to apprize the court and the adverse party of the nature and circumstances of the defence, and to keep the law and the fact distinct. And it is an invariable rule, that every defence, which cannot be thus specially pleaded, may be given in evidence, upon the general issue at the trial. But, special pleading having been frequently perverted to the purposes of chicane and delay, the courts have in some instances, and the Legislature in many more, permitted the general issue to be pleaded, which leaves every thing open, the fact, the law, and the equity of the case; and have allowed special matter to be given in evidence at the trial. And, though it should seem as if much confusion and uncertainty would follow from so great a relaxation of the strictness antiently observed, yet experience has shewn it to be otherwise; especially with the aid of a new trial, in case either party be unfairly surprized by the other.

Special Pleas in bar of the plaintiff's demand, are very various, according to the circumstances of the defendant's case. As, in real actions, a general release or a fine both of which may destroy and bar the plaintiff's title: or, in personal actions, an accord, arbitration, conditions performed, nonage of the defendant, or some other fact which precludes the plaintiff from his action. A *justification* is likewise a special Plea in bar; as in actions of assault and battery, *son assault demesne*, that it was the plaintiff's own original assault; in trespass that the defendant did the thing complained of in right of some office which warranted him so to do; or, in an action of slander, that the plaintiff is really as bad a man as the defendant said he was. See title *Justification*.

The statutes of *limitation* may also be pleaded in bar; that is, the time limited by certain acts of parliament, beyond which no plaintiff can lay his cause of action; as to which see this Dict. title *Limitation of Actions*.

An *Estoppel* is likewise a special Plea in bar: which happens where a man hath done some act, or executed some deed, which estops or precludes him from averring any thing to the contrary. As if tenant for years (who hath no freehold) levies a fine to another person. Though this is void as to strangers, yet it shall work as an estoppel to the cognizor; for, if he afterwards brings an action to recover these lands, and his fine is pleaded against him, he shall thereby be estopped from saying that he had no freehold at the time, and therefore was incapable of levying it. See title *Estoppel*.

No matter of defence arising after action brought can properly be pleaded in bar of the action generally, but it ought to be pleaded in bar of the *further maintenance* of the suit. 4 *East's Rep.* 502.

The conditions and qualities of a Plea (which, as well as the doctrine of estoppels, will also hold equally, *mutatis mutandis*, with regard to other parts of pleading) are, 1. That it be single and containing only one matter; for duplicity begets confusion. But by *stat. 4 & 5 Ann. c. 16.* a man with leave of Court may plead two or more distinct matters or single Pleas; as in an action of assault and battery, these three; not guilty, *son assault demesne*, and the statute of limitations. (But this statute does not extend to penal actions, 4 *T. R. K. B.* 701.) 2. That it be direct and positive, and not argumentative. 3. That it have convenient certainty of time, place, and persons. 4. That it answer the plaintiff's allegations in every material point. 5. That it be so pleaded as to be capable of trial.

Special Pleas are usually in the affirmative, sometimes in the negative, but they always advance some new fact not mentioned in the declaration; and then they must be averred to be true, in the common form:—"and this he is ready to verify."—This is not necessary in Pleas of the general issue; those always containing a total denial of the facts before advanced by the other party, and therefore putting him upon the proof of them.

Each Plea is to have its proper conclusion; and, regularly, all Pleas that are affirmative conclude, "And this he is ready to verify," &c. In a Plea in bar, the defendant in the beginning says, "That the plaintiff ought not to have or maintain his action against him;" and concludes to the action, *viz.* "He prays judgment if the plaintiff ought to have or maintain his action against him," &c. A Plea of a record ought to conclude, "And this he is ready to verify by the record," &c.

It is said, that the conclusion makes the Plea; for if it begins in bar, and concludes in abatement, it is a Plea in abatement. *Ld. Raym.* 337.

It is a rule in pleading, that no man be allowed to plead specially such a Plea as amounts only to the general issue, or a total denial of the charge; but in such case he shall be driven to plead the general issue, in terms; whereby the whole question is referred to a jury. But if the defendant, in an assize or action of trespass, be desirous to refer the validity of his title to the Court rather than the Jury, he may state his title specially, and at the same time *give colour* to the plaintiff, or suppose him to have an appearance or colour of title, bad indeed in point of law, but of which the jury are not competent judges. See this Dict. title *Colour*.

Bonds and Deeds are to be pleaded with a *profert hic in Curia*. See titles *Oyer*; *Profert*.

When the Plea of the defendant is thus put in, if it does not amount to an issue or total contradiction of the declaration, but only evades it, the plaintiff may plead again, and *reply* to the defendant's Plea: either traversing it, that is, totally denying it: as if on an action of debt upon bond the defendant pleads *solvit ad diem*, "that he paid the money when due," here the plaintiff in his *Replication* may totally traverse this Plea, by denying that the defendant paid it: Or he may allege new matter in contradiction to the defendant's Plea; as when the defendant pleads *no award made*, the plaintiff may reply, and set forth an actual award, and assign a breach: Or the replication may *confess and avoid* the Plea, by some new matter or distinction, consistent with the plaintiff's former declaration; as, in an action for trespassing upon land whereof the plaintiff is seised, if the defendant shews a title to the land by descent, and that therefore he had a right to enter, and gives colour to the plaintiff, the plaintiff may either traverse and totally deny the fact of the descent; or he may confess and avoid it, by replying, that true it is that such descent happened, but that, since the descent, the defendant himself demised the lands to the plaintiff for term of life. See titles *Replication*; *Traverse*. To the replication the defendant may *rejoin*, or put in an answer called a *Rejoinder*. The plaintiff may answer the Rejoinder by a *Sur-rejoinder*; upon which the defendant may *rebut*; and the plaintiff answer him by a *Sur-rebutter*. See for further information those titles in this Dict.

The whole of this process is denominated the pleading; in the several stages of which it must be carefully observed, not to depart or vary from the title or defence which the party has once insisted on. For this (which is called a *Departure*, in Pleading) might occasion endless altercation. Therefore the replication must support the declaration, and the rejoinder must support the Plea, without departing out of it. See title *Departure*.

Yet in many actions the plaintiff, who has alleged in his declaration a general wrong, may in his replication, after an evasive Plea by the defendant, reduce that general wrong to a more particular certainty, by assigning the injury afresh with all its specific circumstances, in such manner as clearly to ascertain and identify it consistently with his general complaint; which is called a *New or Novel Assignment*. As, if the plaintiff in trespass declares on a breach of his close in *D.*; and the defendant pleads that the place where the injury is said

to have happened, is a certain close of pasture in *D.* which descended to him from *B.* his father, and so is his own freehold; the plaintiff may reply and assign another close in *D.* specifying the abutments and boundaries as the real place of the injury. *Bro. Abr.* title *Tresspass*, 205. 284.

It hath already been observed that *duplicity* in Pleading must be avoided. Every Plea must be simple, entire, connected, and confined to one single point: it must never be entangled with a variety of distinct independent answers to the same matter; which must require as many different replies, and introduce a multitude of issues upon one and the same dispute. For this would often embarrass the jury, and sometimes the Court itself, and at all events would greatly enhance the expence of the parties. Yet it frequently is expedient to plead in such a manner, as to avoid any implied admission of a fact, which cannot with propriety or safety be positively affirmed or denied. And this may be done by what is called a *Protestation*; whereby the party interposes an oblique allegation or denial of some fact, protesting (*protestando*), that such a matter does, or does not, exist; and at the same time avoiding a direct affirmation or denial. See title *Protestation*.

In any stage of the Pleadings, when either side advances or affirms any new matter, he usually (as has been said) avers it to be true; "and this he is ready to verify." On the other hand, when either side traverses or denies the facts pleaded by his antagonist, he usually *tenders an Issue*, as it is termed; the language of which is different, according to the party by whom the issue is tendered; for if the traverse or denial comes from the defendant, the issue is tendered in this manner, "and of this he puts himself upon the country;" thereby submitting himself to the judgment of his Peers: but if the traverse lies upon the plaintiff, he tenders the issue, or prays the judgment of the Peers against the defendant in another form; thus, "and this he prays may be inquired of by the country."

But if either side (as, for instance, the defendant) pleads a special negative Plea, not traversing or denying any thing that was before alleged, but disclosing some new negative matter; as where the suit is on a bond, conditioned to perform an award, and the defendant pleads, negatively, that no award was made, he tenders no issue upon this Plea; because it does not yet appear whether the fact will be disputed, the plaintiff not having yet asserted the existence of any award: but when the plaintiff replies, and sets forth an actual specific award, if then the defendant traverses the replication, and denies the making of any such award, he then, and not before, tenders an issue to the plaintiff. For when in the course of pleading they come to a point, which is affirmed on one side, and denied on the other, they are then said to be at issue; all their debates being at last contracted into a single point, which must then be determined either in favour of the plaintiff or of the defendant. *Raym.* 199.

That which is alleged by way of *inducement* to the substance of the matter, need not be as certainly alleged as the substance itself. *Plowd.* 81. He who pleads in the *negative*, is not bound to plead so *exactly* as he who pleads in the *affirmative*. And that which a man cannot have certain knowledge of, he is not bound certainly to plead. *Plowd.* 33. 80. 126. 129.

Where the matter is indifferent to be well or ill, and the party

pleads over, the Court will intend it well. *Mod. Cas.* 136. If there be a repugnancy in Pleading, it is error. 2 *And.* 182: *Jenk. Cent.* 21. And a man shall not take advantage of his own wrong, by pleading, *Ec. Cro. Jac.* 588. A man cannot plead any thing afterwards which he might have pleaded at first. *Ibid.* 318. Surplusage shall never make the *Plea* vicious, but where it is contrary to the matter before. *Raym.* 8.

Every man must plead such plea as is proper; but that need not be pleaded on one side, which will come properly on the other. *Hob.* 3. 78. 162.

Where it is doubtful between the parties, whether a *Plea* be good or not, it cannot be determined by the Court on motion, but there ought to be a demurrer to the *Plea*; and on arguing thereof, the Court will judge of the *Plea*, whether good or bad: And no advantage can be had of double Pleading, without *special* demurrer. But though the Court is to judge of Pleading, *they will not direct any person how to plead*, notwithstanding the matter be difficult; for *the parties must plead at their peril*, and Counsel are to advise, *Ec. Lutw.* 422.

A *Plea* may be amended, if it be but in paper, and not entered, paying costs: If after the defendant hath pleaded, the plaintiff alters his declaration, the defendant may alter his *Plea*. See title *Amendment*. Falsehood in a *Plea*, if not hurtful to plaintiff, nor beneficial to defendant, doth no injury; as it doth where detrimental to plaintiff, *Ec. 2 Ill.* 297. Though if an attorney pleads a false plea by deceit, it is against his oath, and he may be fined. 1 *Salk.* 515.

3. AN ISSUE upon Matter of Law is called a *Demurrer*; as to which see this Dictionary under that title.

An issue of fact is, where the fact only, and not the law, is disputed. And when he that denies or traverses the fact, pleaded by his antagonist, has tendered the issue, thus, "and this he prays may be inquired of by the country;" or, "and of this he puts himself upon the country;" it may immediately be subjoined by the other party, "and the said *A. B.* doth the like." Which done, the issue is said to be joined; both parties having agreed to rest the fate of the cause upon the truth of the fact in question. And this issue of fact must, generally speaking, be determined, not by the judges of the Court, but by some other method; the principal of which methods is that by the Country, *per pais*, (in Latin, *per patriam*,) that is, by Jury. See titles *Trial*; *Jury*.

During the whole of the proceedings, from the time of the defendant's appearance in obedience to the King's writ, it is necessary that both the parties be kept or continued in Court from day to day, till the final determination of the suit. For the Court can determine nothing, unless in the presence of both the parties, in person or by their attornies, or upon default of one of them, after his original appearance, and a time prefixed for his appearance in court again. Therefore, in the course of Pleading, if either party neglects to put in his declaration, *Plea*, replication, rejoinder, and the like, within the times allotted by the standing rules of the Court, the plaintiff, if the omission be his, is said to be *nonsuit*, or not to follow and pursue his complaint, and shall lose the benefit of his writ: or, if the negligence be on the side of the defendant, judgment may be had against him, for such his default. And, after issue or demurrer joined, as well as in some of the previous stages of proceeding, a day is continually

given and entered upon the record, for the parties to appear on from time to time, as the exigence of the case may require. The giving of this day is called the *Continuance*, because thereby the proceedings are continued without interruption from one adjournment to another. If these continuances are omitted, the cause is thereby discontinued, and the defendant is discharged *sine die*, without a day, for this turn: for by his appearance in Court he has obeyed the command of the King's writ; and, unless he be adjourned over to a day certain, he is no longer bound to attend upon that summons; but he must be warned afresh, and the whole must begin *de novo*. See title *Discontinuance of Process*.

Now it may sometimes happen, that after the defendant has pleaded, nay, even after issue or demurrer joined, there may have arisen some new matter, which it is proper for the defendant to plead; as that the plaintiff, being a feme-sole, is since married, or that she has given the defendant a release, and the like: here, if the defendant takes advantage of this new matter, as early as he possibly can, *viz.* at the day given for his next appearance, he is permitted to plead it in what is called a Plea, *puis darrein continuance*, or, "since the last adjournment." For it would be unjust to exclude him from the benefit of this new defence, which it was not in his power to make when he pleaded the former. But it is dangerous to rely on such a Plea, without due consideration; for it confesses the matter which was before in dispute between the parties. *Cro. Eliz.* 49. And it is not allowed to be put in, if any continuance has intervened between the arising of this fresh matter and the pleading of it: for then the defendant is guilty of neglect, and is supposed to rely on the merits of his former Plea. Also it is not allowed after a demurrer is determined, or verdict given; because then relief may be had in another way, namely, by writ of *audita querela*. *Cro. Jac.* 646. And these Pleas *puis darrein continuance*, when brought to a demurrer in law, or issue of fact, shall be determined in like manner as other Pleas.

Demurrers, or questions concerning the *sufficiency* of the matters alleged in the Pleadings, are to be determined by the Judges of the Court, upon solemn argument; and to that end a demurrer book is made up, containing all the proceedings at length, which are afterwards entered on *record*; and copies thereof, called *Paper-books*, are delivered to the Judges to peruse. The *record* is a history of the most material proceedings in the cause entered on a parchment roll, and continued down to the present time; in which must be stated the original writ and summons, all the Pleadings, the declaration, view or *oyer* prayed, the imparlances, Plea, replication, rejoinder, continuances, and whatever farther proceedings have been had; all entered *verbatim* on the roll, and also the issue or demurrer, and joinder therein.

These were formerly all written, as indeed all public proceedings were, in *Norman* or *Law French*, and even the arguments of the Counsel, and decisions of the Court, were in the same barbarous dialect. An evident and shameful badge, it must be owned, (says *Blackstone*,) of tyranny and foreign servitude; being introduced under the auspices of *William the Norman*, and his sons. This continued till the reign of *Edward III.*; who, having employed his arms successfully in subduing the *Crown of France*, thought it unbecoming the dignity of the victors to use any longer the *language* of a vanquished

country. By the *stat.* 36 *E. 3. c. 15*, it was therefore enacted, that, for the future, all Pleas should be pleaded, shewn, defended, answered, debated, and judged in the *English* tongue, but be entered and enrolled in *Latin*. The practisers, however, being used to the *Norman* language, and therefore imagining they could express their thoughts more aptly and more concisely in that than in any other, still continued to take their notes in *Law French*: and of course, when those notes came to be published, under the denomination of Reports, they were printed in that dialect, 3. *Com. c. 21*.

The learned Commentator then proceeds to shew the necessity, and in some measure the propriety of these antient law languages; and afterwards thus proceeds, in the history of the change of that used in Pleadings and Record:

This technical *Latin* continued in use from the time of its first introduction, till the subversion of our antient constitution under *Cromwell*; when, among many other innovations in the Law, some for the better and some for the worse, the language of our records was altered and turned into *English*. But at the restoration of *K. Charles II.*, this novelty was no longer countenanced; the practisers finding it very difficult to express themselves so concisely or significantly in any other language but the *Latin*. And thus it continued, without any sensible inconvenience till about the year 1730, when it was again thought proper that the proceedings at Law should be *done in English*; and it was accordingly so ordered by *stat. 4 Geo. 2. c. 26*. This provision was made, according to the preamble of the statute, that the common people might have knowledge and understanding of what was alleged or done for and against them in the process and Pleadings, the judgment and entries in a cause. Which purpose has, it is to be feared, not been very completely answered. On the other hand, these inconveniences have already arisen from the alteration; that now many clerks and attornies are hardly able to read, much less to understand, a record, even of so modern a date as the reign of *George I.* And it has much enhanced the expence of all legal proceedings: for since the practisers are confined (for the sake of the stamp duties, which are thereby considerably increased) to write only a stated number of words in a sheet; and as the *English* language, through the multitude of its particles, is much more verbose than the *Latin*; it follows that the number of sheets must be very much augmented by the change. The translation also of technical phrases, and the names of writs and other process, were found to be so very ridiculous, (a writ of *nisi prius*, *quare impedit*, *fieri facias*, *habeas corpus*, and the rest, not being capable of an *English* dress with any degree of seriousness,) that in two years time it was found necessary to make a new act, *stat. 6 Geo. 2. c. 14*; which allows all technical words to continue in the usual language, and has thereby almost defeated every beneficial purpose of the former statute.

What is said of the alteration of language by *stat. 4 G. 2. c. 26*, will hold equally strong with respect to the prohibition of using the antient immutable *court hand* in writing the records or other legal proceedings; whereby the reading of any record that is fifty years old is now become the object of science, and calls for the help of an antiquarian. But that branch of it, which forbids the use of abbreviations, seems to be of more solid advantage, in delivering such proceedings from obscurity.

When the substance of the Record is completed, and copies are delivered to the judges, the matter of law upon which the Demurrer is grounded is upon solemn argument determined by the Court and judgment is thereupon accordingly given by them. See title *Demurrer*.

An issue of fact takes up more form and preparation to settle it; for here the truth of the matters alleged must be solemnly examined and established by proper evidence in the channel prescribed by law. To which examination of Facts, the name of *Trial* is usually confined. As to which, see this Dict. titles *Trial*; *Jury*, &c.

If, by the misconduct or inadvertence of the Pleadings, the issue be joined on a fact totally immaterial, or insufficient to determine the right; so that the Court, upon the finding, cannot know for whom judgment ought to be given; the Court will award a *Repleader quod partes replacent*. As if, in an action on the case in *assumpsit* against an executor, he pleads that he himself (instead of the testator) made no such promise. 2 *Ventr.* 196. So if, in an action of debt on bond, conditioned to pay money *on or before* a certain day, the defendant pleads payment *on the day*; which issue, if found for the plaintiff, would be inconclusive, as the money might have been paid *before*. *Str.* 994. Unless it appears, from the whole record, that nothing material can possibly be pleaded in any shape whatsoever, and then a *Repleader* would be fruitless. 4 *Burr.* 301, 2. And, whenever a *Repleader* is granted, the Pleadings must begin *de novo* at that stage of them, whether it be the Plea, replication, or rejoinder, &c. wherein there appears to have been the first defect, or deviation from the regular course. *Raym.* 458: *Salk.* 579: See further title *Repleader*.

4. It hath been already noticed, (see ante 1,) that after the plaintiff has declared, and the defendant appeared, he may be allowed a certain time by *Imparlance* to prepare for his defence. *The practical effect of such imparlance*, and the time in all cases allowed for the defendant to plead, is here to be noticed; as laid down in *Tidd's Pract. K. B.* where a vast number of authorities on the subject are collated and digested, in the following short and perspicuous manner:

After a *general* *Imparlance*, the defendant can only plead in *bar* of the action; and cannot regularly plead to the *jurisdiction* of the Court, in *abatement*, or a *tender* and *touts temps prist*. It is then also too late, as has already been hinted, to claim *conusance*, or demand *oyer* of a deed, &c. After a *special* *Imparlance*, the defendant may plead in *abatement*, though not to the *jurisdiction* of the Court. And where the defendant pleaded a *misnomer* in *abatement*, after an *Imparlance*, which was entered thus; "And *A. B.* who was arrested by the name of *A. C.* comes," &c.; the Court held this to be tantamount to a *special* *imparlance*. After a *general-special* *Imparlance*, the defendant may not only plead in *abatement* of the writ, bill, or count, but also *privilege*, which is a Plea to the *person* of the defendant, affecting the *jurisdiction* of the Court. But he cannot plead a *tender* and *touts temps prist*, after any kind of *Imparlance*; for by craving time, he admits he is *not ready*, and so falsifies his Plea. A *tender* must therefore be pleaded before *Imparlance*, of the same term with the declaration; unless the declaration be delivered or filed so late that the defendant is not obliged to plead to it that term: and then it may be pleaded *of course*, within the first four days inclusive

of the next term, or even afterwards, upon *motion*, as of the preceding term. See *Tender*.

If the defendant plead in abatement after a *general* Impar lance, to the jurisdiction of the Court after a *special* Impar lance, or a *tender* after any kind of Impar lance, the plaintiff may *demur*, or allege the Impar lance in his replication, by way of *estoppel*; but if the plaintiff, instead of demurring, or alleging the estoppel, reply to the special matter of the Plea, the fault is cured.

Formerly, the defendant had always an Impar lance, to the term next after the return of the process, unless the proceedings were by *original*, upon a *habeas corpus*, for or against *attornies* or other privileged persons, or against *prisoners* in custody of the marshal. On proceedings by *original*, if the action were laid in *London* or *Middlesex*, and the defendant appeared before the *last* return of the term; or if the action were laid in any other county, and the defendant appeared the *first* return of *Hilary* or *Trinity* term, or before the *third* return of *Michaelmas* or *Easter* term; no Impar lance was allowed, without consent or special rule. So upon a *habeas corpus*, returnable in *Michaelmas* or *Easter* term, if the declaration were delivered before the *third* return, the defendant was not entitled to an Impar lance. And where the proceedings were for or against *attornies* or other privileged persons, or against *prisoners* in custody of the marshal, the defendant was bound to plead, without any Impar lance, the same term the declaration was delivered, if delivered *four* days exclusive before the end of the term. Afterwards, when the clause of *ac-etiam* had been introduced into the bill of *Middlesex*, and other process in trespass, it became a rule, that where the cause of action was specially expressed in the process, the defendant should not have liberty of imparling, without leave of the Court; but should plead within the time allowed, by the course of the Court, to defendants sued by original writ. *Rule, Hil. 2 Geo. 2.* And at length it was determined, that even upon a special *capias* by original, the defendant should not be obliged to plead, sooner than upon a common *latitat*. The former distinctions upon this subject being thus gradually abolished, it is now settled; that where the defendant has appeared, or filed bail, upon any kind of process, returnable the *first* or *second* return of any term, if the plaintiff declare in *London* or *Middlesex*, and the defendant live within twenty miles of *London*, the declaration should be delivered or filed *absolutely*, with notice to plead within *four* days; or in case the plaintiff declare in any other county, or the defendant live above twenty miles from *London*, within *eight* days *exclusive*, after the delivery or filing thereof; and the defendant must plead accordingly, without any Impar lance: or in default thereof, the plaintiff may sign judgment. *Rule, Trin. 5 & 6 Geo. 2. (a).*

Where the defendant has not appeared, or filed bail, the rule is, that, "upon all process returnable before the *last* return of any term, where no *affidavit* is made and filed of the cause of action, the plaintiff may file or deliver the declaration *de bene esse*, at the return of such process, with notice to plead in *eight* days *exclusive*, after the filing or delivery thereof;" *Rule, Trin. 22 Geo. 3:* (and see *Rule, Mich. 10 Geo. 2:*) being the same time as is allowed for the defendant to appear and file common bail: and "if the defendant do not file common bail, and plead within the said *eight* days, the plaintiff, having filed common bail for him, may sign judgment for want of

a Plea." *Rule, Trin. 22 G. 3.* But if the declaration be not filed, until *after* the return of the process, the defendant has *eight* days to plead, from the time of filing it, whenever it may be. And "upon all such process, *where an affidavit is made* and filed of the cause of action, the declaration may be filed or delivered *de bene esse*, at the return of such process, with notice to plead, in *four* days after the filing or delivery, if the action be laid in *London* or *Middlesex*, and the defendant live within twenty miles of *London*; and in *eight* days, if the action be laid in any other county, or the defendant live above twenty miles from *London*;" *Rule, Trin. 22 Geo. 3:* being the same time as is allowed for pleading, where the declaration is delivered or filed *absolutely*. And, "if the defendant put in bail, and do not plead within such times as are respectively before-mentioned, judgment may be signed." *Same Rule.* But in all the foregoing cases, the declaration should be delivered, or filed, and notice thereof given, *four* days *exclusive* before the end of the term; a rule to plead duly entered; and a Plea demanded, when necessary. *Rules, Trin. 5 & 6 Geo. 2, b; Mich. 10 Geo. 2. Reg. 2: Trin. 22 Geo. 3.*

Where the process is returnable the *last* return of the term, or where it is returnable before, but the declaration is not delivered, or filed, and notice thereof given, *four* days *exclusive* before the end of the term, the defendant is entitled to an *Imparlance*; and must plead within the first *four* days of the next term, provided the declaration be delivered, or filed, and notice thereof given, before the *essoin-day* of that term: otherwise, the defendant will be allowed to *imparl* to the subsequent term. *Rule, Trin. 5 & 6 Geo. 2.*

If four terms have elapsed, since the delivery or filing of the declaration, the defendant shall have a whole term's notice to plead, before judgment can be entered against him. *Rule, Trin. 5 & 6 Geo. 2. b.* Unless the cause have been stayed by *injunction* or privilege; and the notice in such case must be given before the *essoin-day* of the term: but it does not extend beyond the term; and therefore a rule to plead may be entered, and judgment signed, in the vacation.

It remains to be observed, within what time the defendant must plead, after changing the *venue*, demanding *oyer*, or *amending* the declaration. After changing the *venue*, the defendant must plead to the new action, as he should have done in the other, without delay. *Rule, Mich. 1654. § 5.* After the delivery of *oyer*, the defendant shall have the same time to plead, as he had when he demanded it. See title *Oyer*. And if the plaintiff *amend* his declaration, the defendant shall have *two* days, exclusive of the day of amendment, to alter his first Plea, or plead *de novo*. *Rule, Tr. 5 & 6 Geo. 2.*

If the defendant be not ready to plead, by the expiration of the time allowed him for that purpose, his attorney or agent should take out a *summons*, and serve it upon the plaintiff's attorney or agent, requiring him to attend a judge, and shew cause why the defendant should not have further time to plead. When the summons is taken out, and made returnable before the expiration of the time for pleading, it is a stay of proceedings, pending the application: but it is otherwise when taken out, or made returnable, after the expiration of the time for pleading: nor will it operate as a stay of proceedings, where the object of it is collateral to the time for pleading; as, to discharge the defendant out of custody upon common bail, &c.

The plaintiff's attorney or agent, on being served with the summons, either indorses his consent to an order being made upon it, at-

tends the Judge, or makes default. In the latter case, the defendant's attorney or agent, after waiting an hour, should take out a *second* summons, and after that a *third* (if necessary), which should be respectively served and attended as the first. And if default be made upon three summonses, the Judge, on affidavit thereof, will make an order *ex parte*. But if any one of the summonses be attended, the Judge will make an order upon, or discharge it, as he sees cause; and if he make an order for a month's time to plead, it is understood to mean a *lunar*, and not a *calendar* month.

The order of a Judge, for time to plead, must be served in like manner as the summons. And it is either upon, or without, terms. The usual terms are, pleading *issuably*, rejoining *gratis*, and taking short notice of trial or inquiry. And where the defendant is an *executor* or *administrator*, he must undertake not to plead any judgment obtained against him, since his time for pleading was out; for otherwise he might confess judgments in the mean time, and plead them in bar to the plaintiff's demand.

An *issuable* Plea is a Plea *in chief* to the merits, upon which the plaintiff may take issue, and go to trial. Therefore, a Plea in abatement is not an issuable Plea; nor a false Plea of judgment recovered, or other Plea which does not go to the merits. But a Plea of tender has been deemed an issuable Plea, and also a Plea of the statute of limitations, or that a bail-bond was taken for ease and favour. As to *demurrers*, there is a distinction between a real and fair demurrer, and a demurrer without good cause: the former is an issuable Plea, within the meaning of a Judge's order; the latter is not, but only an evasion of it. By rejoining *gratis* is meant, rejoining without the common four day rule to rejoin. Short notice of trial, in *country* causes, must be given at least *four* days before the commission-day; one day exclusive, and the other inclusive. *Rule, East. 30 Geo. 3.* In *town* causes, *two* day's notice seems to be sufficient: but it is usual to give as much more as the time will admit of. The defendant, however, is not precluded by these terms, from demurring to the replication, if there be good cause. *Rule, Trin. 5 & 6 Geo. 2. b.*

Where the defendant is under a Judge's order to plead *issuably*, and pleads a Plea which is not issuable, the plaintiff may consider it as a mere nullity, and sign judgment: and where several Pleas are pleaded, one of which is not issuable, it will vitiate all the others. But where it is doubtful whether the Plea be issuable, the better way, in term-time, is to move the Court to set it aside.

Of the Rule to plead, and Demand of a Plea.

If a defendant be bound by rule of Court, or order of a Judge, to plead by a time therein limited, it is incumbent on him to do so; although the plaintiff do not enter any rule to plead, or call for a Plea. *Rule, Trin. 5 & 6 Geo. 2.* With this exception, the plaintiff must in all cases enter a rule to plead, whether the defendant have appeared or not; and where the defendant has appeared, he must also demand a Plea, before he can sign judgment.

The *Rule to plead* is the order of the Court; and may be entered, at any time after the delivery, or filing and notice of the declaration, in term, or within four days after; and *Sunday* is a day within this rule, unless it be the first or last. Antiently, there were two rules.

given, of *four* days each; the first, *ad respondendum*; the second, *ad respondendum peremptoriè*. These were afterwards converted into one *eight-day* rule; but now, "*four* days only shall be allowed the defendant, from the time of giving any rule to plead." *Rule, Trin. 1 Geo. 2*: which four days expire before, with, or after the time for pleading. If they expire before, the plaintiff must wait till the expiration of the time for pleading, before he can sign judgment for want of a Plea: but if they expire with or after that time, "the plaintiff is at liberty to sign his judgment, the day after the rule for pleading is out; the declaration having been regularly delivered or filed, and the defendant or his agent being called upon for a Plea." *Rule, Hil. 2 Geo. 2. Reg. 3.*

When a rule to plead has been once entered, and the cause stands over to another term, without any further proceeding, a new rule to plead should regularly be entered in that term, to entitle the plaintiff to sign judgment; for all judgments must be entered the same term in which rules are given. Where the declaration is amended, if a rule to plead be entered the same term the amendment is made, though before such amendment, it is sufficient; otherwise a new rule to plead must be entered. And where the plaintiff, after giving a rule to plead, has been delayed by injunction, he may sign judgment after the injunction is dissolved, without a new rule.

The demand of Plea is a notice in writing from the plaintiff's attorney; and, except where the defendant is in custody of the sheriff, &c. must be made in every case where the defendant has appeared. But before the defendant has appeared, or after the plaintiff has entered an appearance, or filed common bail for him, according to the statute, or where the defendant is in custody of the sheriff &c. the demand of a Plea is unnecessary. It is usually made *pending* the time for pleading; and the plaintiff cannot sign judgment, till the expiration of twenty-four hours from the time of making it. But if the time for pleading be out, judgment may be signed at any time after the twenty-four hours are expired; and therefore if the Plea be demanded in the morning, the plaintiff is not obliged to wait until the opening of the office, in the afternoon of the following day.

II. WHEN a Criminal is indicted of felony, &c. he ought not to be allowed to plead to the indictment till he holds up his hand at the bar, which is in nature of an appearance. See title *Trial*.

The Plea of a prisoner, or defensive matter alleged by him on his arraignment, if he does not confess or stand mute, may be either a Plea to the Jurisdiction; a *demurrer*; a Plea in *Abatement*; a *special Plea* in Bar; or the *General Issue*. See 4 *Comm. c. 26*.

Formerly there was another Plea, that of *Sanctuary*, now abrogated; and as to which, see this Dict. title *Sanctuary*.

The *Benefit of Clergy* used also formerly to be pleaded before trial or conviction, and was called a *Declinatory Plea*; which was the name also given to that of *Sanctuary*. 2 *Hal. P. C. 236*. But as the prisoner upon a trial has a chance to be acquitted and totally discharged; and, if convicted of a clergyable felony, is entitled equally to his clergy after, as before conviction, this course is extremely disadvantageous, and therefore the Benefit of Clergy is now very rarely pleaded; but if found requisite, is prayed by the Convict before judgment is passed upon him. See titles *Judgment (Criminal)*; *Clergy*, *Benefit of*.

A Plea to the Jurisdiction is, where an Indictment is taken before a Court that hath no cognizance of the offence; as if a man be indicted for a rape at the Sheriff's tourn; or for treason at the Quarter-sessions: in these or similar cases, he may except to the Jurisdiction of the Court, without answering at all to the crime alleged. 2 Hal. P. C. 256.

A Demurrer is incident to criminal cases as well as to civil: see this Dict. title *Demurrer to Indictments*.

A Plea in Abatement is principally for a *misnomer*, a wrong name, or a false addition to the prisoner. As if *James Allen, Gentleman*, is indicted by the name of *John Allen, Esquire*; he may plead that he has the name of *James* and not of *John*, and that he is a *Gentleman* and not an *Esquire*; and if either fact is found by a Jury, then the indictment shall be abated, as writs or declarations may be in civil actions. See *ante*, I. 2. and this Dict. titles *Abatement*; *Misnomer*.

But, in the end, there is little advantage accruing to the prisoner by means of these dilatory Pleas; because, if the exception be allowed, a new bill of indictment may be framed, according to what the prisoner in his Plea avers to be his true name and addition. For it is a rule, upon all Pleas in Abatement, that he, who takes advantage of a flaw, must at the same time shew how it may be amended.

Special Pleas in Bar go to the merits of the indictment; and give a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime alleged. These are of four kinds: *A former Acquittal*; *A former Conviction*; *A former Attainder*, or *A Pardon*. There are many other Pleas, which may be pleaded in bar of an appeal; but these are applicable as well to appeals as indictments. See title *Appeal* I.

First the Plea of *autrefois acquit*, or a *former acquittal*, is grounded on this universal maxim of the common law of *England*; that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once *fairly* found not guilty upon any indictment, or other prosecution, before any Court, having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime. Therefore an acquittal, on an appeal, is a good bar to an indictment on the same offence. And so also was an acquittal on an indictment a good bar to an appeal, by the Common Law: and therefore, in favour of appeals, a general practice was introduced, not to try any person on an indictment of homicide, till after the year and day, within which appeals may be brought, were past; by which time it often happened that the witnesses died, or the whole was forgotten. To remedy which inconvenience, the statute 3 Hen. 7. c. 1. enacts, that indictments shall be proceeded on, immediately, at the King's suit, for the death of a man, without waiting for bringing an appeal; and that the Plea of *autrefois acquit*, on an indictment, shall be no bar to the prosecuting of any Appeal. See title *Appeal* I. and at large, 2 Hawk. P. C. c. 35.

Secondly, the Plea of *autrefois convict*, or a *former conviction*, for the same identical crime, though no judgment was ever given, or perhaps will be, (being suspended by the Benefit of Clergy or other causes,) is a good Plea in bar to an indictment. And this depends upon the same principle as the former; that no man ought to be twice brought in danger of his life for one and the same crime.

Hereupon it has been held, that a conviction of manslaughter, on an appeal or an indictment, is a bar even in another appeal, and much more in an indictment of murder; for the fact prosecuted is the same in both, though the offences differ in colouring and in degree. See 2 *Hawk. P. C. c. 36. § 10. &c.*

It is to be observed, that the Pleas of *autrefois acquit* and *autrefois convicts*, or a former acquittal, and former conviction, must be upon a prosecution for the same identical act and crime.

But the case is otherwise in the Plea of *autrefois attain*, or a former attainder; which is a good Plea in bar, whether it be for the same or any other felony. For wherever a man is attainted of felony by judgment of death, either upon a verdict or confession, by outlawry, or, heretofore, by abjuration; and whether upon an appeal or an indictment; he may plead such attainder in bar to any subsequent indictment or appeal, for the same or for any other felony. 2 *Hawk. P. C. c. 36. § 1.* And this, because, generally such proceeding on a second prosecution cannot be to any purpose: for the prisoner is dead in law by the first attainder, his blood is already corrupted, and he hath forfeited all that he had: so that it is absurd and superfluous to endeavour to attain him a second time. But to this general rule however, as to all others, there are some exceptions: wherein, *cesante ratione, cessat et ipsa lex*. As, where the former attainder is reversed for error, for then it is the same as if it had never been. And the same reason holds, where the attainder is reversed by Parliament, or the judgment vacated by the King's Pardon, with regard to felonies committed afterwards.—Where the attainder was upon indictment, such attainder is no bar to an appeal: for the prior sentence is pardonable by the King; and if that might be pleaded in bar of the appeal, the King might in the end defeat the suit of the Subject, by suffering the prior sentence to stop the prosecution of a second; and then, when the time of appealing is elapsed, granting the delinquent a pardon.—An attainder in felony is no bar to an indictment of treason: because not only the judgment and manner of death are different, but the forfeiture is more extensive, and the land goes to different persons.—Where a person, attainted of one felony, is afterwards indicted as principal in another, to which there are also accessaries, prosecuted at the same time; in this case it is held, that the Plea of *autrefois attain* is no bar, but he shall be compelled to take his trial, for the sake of public justice: because the accessaries to such second felony cannot be convicted till after the conviction of the principal. *Poph.* 107. But see title *Accessory*. And from these instances it may be collected, that the Plea of *autrefois attain* is never good, but when a second trial would be quite superfluous. See 2 *Hawk. P. C. c. 36. § 1—10.*

Lastly, a Pardon may be pleaded in bar; as at once destroying the end and purpose of the indictment by remitting that punishment, which the prosecution is calculated to inflict. See this Dict. title *Pardon*.

Though in civil actions, when a man has his election what Plea in bar to make, he is concluded by that Plea, and cannot resort to another if that be determined against him: (as if, on an action of debt the defendant pleads a general release, and no such release can be proved, he cannot afterwards plead the general issue, *nil debet*, as he might at first; for he has made his election what Plea to abide by,

and it was his own folly to chuse a rotten defence;) yet in criminal prosecutions, *in favorem vitæ*, as well upon appeal as indictment, when a prisoner's Plea in bar is found against him upon issue tried by a jury, or adjudged against him in point of law by the Court; still he shall not be concluded or convicted thereon, but shall have judgment of *respondeat ouster*, and may *plead over* to the felony the general issue, not guilty. 2 *Hal. P. C.* 239. For the law allows many Pleas, by which a prisoner may escape death; but only one Plea, in consequence whereof it can be inflicted; viz. on the *general issue*, after an impartial examination and decision of the facts, by the unanimous verdict of a jury.

The general issue, or Plea of *Not-Guilty*, then, is the only Plea upon which the prisoner can receive his final judgment of death. In case of an indictment of felony or treason, there can be no special justification put in by way of Plea. As, on an indictment for murder, a man cannot *plead* that it was in his own defence against a robber on the highway, or a burglar; but he must plead the general issue, *Not Guilty*, and give this special matter in evidence. For (besides that these Pleas do in effect amount to the general issue, since, if true, the prisoner is most clearly not guilty,) as the facts in Treason are laid to be done *proditoriè et contra ligeantiæ suæ debitum*; and, in felony, that the killing was done *felonice*; these charges, of a traiterous or felonious intent, are the points and very gist of the indictment, and must be answered directly, by the general negative, *Not Guilty*; and the jury upon the evidence will take notice of any defensive matter, and give their verdict accordingly, as effectually as if it were, or could be specially pleaded. So that this is, upon all accounts, the most advantageous Plea for the prisoner. 2 *Hal. P. C.* 258. Thus also, in an indictment for an assault, if the prosecutor struck first, the defendant is not, as in civil suits, to plead *son assault demesne*, but the general issue, *Not Guilty*, and give the special matter in evidence.

When the prisoner hath thus pleaded *not guilty*, *non culpabilis*, or *nient culpable*; which was formerly used to be abbreviated upon the minutes, thus, "*non* (or *nient*) *cul.*" the clerk of the assise, or clerk of the arraigns, on behalf of the Crown, replies, that the prisoner is guilty, and that he is *ready* to prove him so. This is done by two monosyllables "*cul. prit.*" which signifies first, that the prisoner is guilty, (*cul. culpable*, or *culpabilis*;) and then that the King is ready to prove him so; *prit præsto sum*, or *paratus verificare*. By this replication, the King and the prisoner are therefore at issue. 4 *Comm.* 339.

Mr. *Christian*, in his note on the passage in the Commentaries, from whence the foregoing is abridged, remarks, that the explanation of *prit* from *præsto sum*, or *paratus verificare*, however ingenious, is inconsistent both with the principles and practice of special Pleading. After the *general issue*, or the Plea of *Not Guilty*, there could be no replication; the words *paratus verificare* could not therefore possibly have been used. This Plea in Latin was entered thus upon the record. *Non inde est culpabilis, et pro bono et malo ponit se super patriam*. After this the Attorney-General, the King's Coroner, or Clerk of Assize, could only join issue by *facit similiter*, i. e. he doth the like. See the *Appendix* § 1. p. iii. at the end of 4 *Comm.*

Mr. *Christian* suggests that *prit*, was an easy corruption of *pñt*,

written for *ponit* (*se super fatriam*) by the clerk; as a minute that issue was joined: or *pñt se* might be converted into *frist* or *prest*, as it is sometimes written.

In confirmation of the conjecture that *frist* is a corruption of *pñt*, it is observable that the clerk of the Arraignment immediately after the Arraignment, writes upon the indictment, over the name of the prisoner, *pñts*.

But however it may have arisen, the joining of issue, (which though now usually entered on the record, is no otherwise joined in any part of the proceedings,) seems to be clearly the meaning of this obscure expression; which has puzzled our most ingenious etymologists, and is commonly understood as if the Clerk of the Arraignment, immediately on Plea pleaded, had fixed an opprobrious name on the prisoner, by asking him, "*Culprit!* how wilt thou be tried?" for immediately upon issue joined, it is inquired of the prisoner, by what trial he will make his innocence appear. This form has at present reference to appeals and approvements only; wherein the appellee has his choice, either to try the accusation by battel or by jury. But upon indictments, since the abolition of ordeal, there can be no other trial but by jury, *per pais*, or by the country: and therefore, if the prisoner refuses to put himself upon the inquest in the usual form, that is, to answer that he will be tried by God and the Country, if a Commoner; and, if a Peer, by God and his Peers; (*Kel. 57: St. Tr. passim*;) the indictment, if in treason is taken *pro confesso*: and the prisoner in cases of felony, is adjudged to stand mute, and if he perseveres in his obstinacy, shall be convicted of the felony. See title *Mute*.

When the prisoner has thus put himself upon his trial, the clerk answers in the humane language of the Law, which always hopes that the party's innocence, rather than his guilt, may appear, "God send thee a good deliverance." And then they proceed, as soon as conveniently may be, to the trial; as to which, see titles *Jury*; *Trial*; and the references there.

PLEAS OF THE SWORD, *Placita ad gladium*.] *Ranulph*, the third Earl of *Chester*, in the second year King *Henry III.* granted to his Barons of *Cheshire* an ample charter of liberties; *Exceptis placitis ad gladium meum pertinentibus. Rot. Pat. in archivis Regis infra castellum Cestrie*, 3 *E. 4. m. 9.*—The reason was, because *William the Conqueror* gave the Earldom of *Chester* to his kinsman *Hugh*, commonly called *Lufus*, ancestor to this Earl *Ranulph*, *tenere ita liberè per gladium sicut ipse Rex Willielmus tenuit Angliam per coronam*. And consonant thereto in all indictments for felony, murder, &c. in that county palatine, the form was antiently *Contra pacem Domini comitis, gladium & dignitates suas*, or *Contra dignitatem gladii Cestrie*. These were the Pleas of the dignity of the Earl of *Chester*. Sir *Peter Leicester's Hist. Antiq.* 164. *Cowell*.

PLEBANIA, *Plebanalis ecclesia*.] A mother church, which has one or more subordinate chapels. *Cowell*.

PLEBANUS, A rural dean; because the deaneries were commonly affixed to the *Plebania*, or chief mother church within such a district, at first commonly of ten parishes: but it is inferred from divers authorities, that *Plebanus* was not the usual title of every rural dean; but only of such a parish priest in a large mother church, exempt from the jurisdiction of the Ordinary, who had the authority of a rural dean committed to him by the Archbishop, to whom the church

was immediately subject. *Whartoni Ang. Sacr. Pa.* 1. 569: *Reg. Eccl. Christ. Cantuar. MS.* See title *Dean*.

PLEDGE, *flegius*, may be derived from the Fr. *pleige*, *fideijussor*.] As *pleiger aucun*, i. e. *fide juberé pro aliquo*, to be surety for a person; in the same signification is *flegius* used by *Glanvil*, lib. 10. c. 5. and *flegiatio* for the act of suretiship, in the interpreter of the *Grand Custumary of Normandy*, c. 60. 89, 90; *Charta de Foresta*. This word *flegius* is used also for frankpledge sometimes, as in the end of *William the Conqueror's* laws, set out by *Lambard* in his *Archaionom.* 125. and these are called capital pledges. *Kitch.* 10. See 4 *Inst.* 180.

When writs were delivered to the Sheriff to be by him returned into *C. B.* he was obliged, before the return, to take Pledges of prosecution, which, when the fines and amercements were considerable, were real and responsible persons, and answerable for those amercements. But they being now so inconsiderable, there are only formal Pledges entered, viz. *John Doe* and *Richard Roe*. But there is a difference in debt and in trespass; for in trespass the attachment of the goods is the first process, and because the defendant is thereby hurt, therefore the writ commands the Sheriff to take Pledges, before he executes the process. But in debt, they begin with a summons, and so the defendant is not hurt in the first instance, therefore there is no command in the writ to the Sheriff to take Pledges, but unless he does, there is not a sufficient authority from the return to warrant further Process, unless Pledges are put in above, as in *B. R.* they always do on the bill. The reason why Pledges were not taken in Chancery, but committed to the Sheriff, was, that he, living in the county, was supposed to know who were sufficient security, and being to levy the amercement afterward, they were to take ample security for them. *Gilb. Hist. of C. B.* 6, 7. See title *Process*.

The plaintiff's Pledges, that he shall prosecute his suit, may be entered at any time pending the action; and the putting in of Pledges is now a mere form. See the *stats.* 16 & 17 *C. 2. c. 8: 4 & 5 Ann. c. 16: 5 Geo. 1. c. 13:* under title *Amendment* in this Dictionary.

PLEDGES OF GOODS for money, &c. See titles *Pawn; Bailment*. There is also a Pledge in law; where the law, without any special agreement between parties, doth enable a man to keep goods in nature of a distress, &c. 2 *Comm.* 452. See title *Distress*.

PLEDGERY or **PLEGGERY**, Fr. *plegerie*, Lat. *plegiagium*.] Suretiship, an undertaking or answering for. "Also the appellant shall require the constable and mareschal to deliver his pledges, and to discharge them of their *Pledgery*; and the constable and mareschal shall ask leave of the King to acquit his pledges, after the appellant is come into his lists." &c. *Cowell*.

PLEDGING; See *Pawn; Bailment*.

PLEGIIS ACQUIETANDIS, A writ that antiently lay for a Surety, against him for whom he was surety, if he paid not the money at the day. *F. N. B.* 137. If the party who becomes surety be compelled to pay the money, &c. he shall have his writ against the person who ought to have paid the same. And if a man be surety for another, to pay a sum of money, so long as the principal debtor hath any thing, and is sufficient, his sureties shall not be distrained, by the statute of *Magna Charta*: if they are distrained, they shall have a special writ on the statute to discharge them. *Magna Charta* 9 *H. 3. c. 8*. But if the plaintiff sue the sureties in *C. B.* where the principal is

sufficient to pay the debt, whether the sureties may plead that, and aver that the principal debtor is sufficient to pay it; or whether they shall have a writ to the Sheriff not to distrain in such a case, hath been made a question. *New Nat. Br.* 306. It was adjudged (*Pasch. 43 Ed. 3.*) that the writ *de Plegiis acquietandis* lieth without any specialty shewed thereof; as it has been held, that a man shall have an action of debt against him who becometh pledge for another, upon his promise to pay the money, without any writing made of it. *New Nat. Br.* 270. 304. But notwithstanding these old authorities, there seems now little doubt, that a man may maintain his action against the surety, as soon as the cause of action accrues, without any regard to the circumstances of the principal. And it hath been determined, that if a surety in a bond pays the debt of the principal, he may recover it back from the principal, in an action of assumpsit for so much money paid and advanced to his use. *2 Term Rep.* 105.

PLENA FORISFACTURA, A forfeiture of all that one hath, &c. See *Forfeiture*.

PLENARTY, the abstract of the adjective *plenus*, and is used in Common Law in matters of benefices, where a church is full of an incumbent; *Plenarty* and vacation, or avoidance, being direct contraries. *Staundf. Prærog. c. 8. f. 32: Stat. Westm. 2. c. 5.* A clerk inducted may plead his patron's title; and, being instituted by the space of six months, his patron may plead *Plenarty* against all common persons. *Plowd.* 501. Institution by six months, before a writ of *quare impedit* brought, is a good *Plenarty* against a common person; but *Plenarty* is no plea against the King, till six months after induction. *Co. Litt.* 119. 344. *Plenarty* for six months is not generally pleadable against the King, because he may bring *quare impedit* at any time, and *nullum tempus occurrit regi*: though, if a title devolves to the King by lapse, and the patron presents his clerk by usurpation, who is instituted and inducted, and enjoys the benefice for six months, this is such a *Plenarty* as deprives the king of his presentation. *2 Inst.* 361. And *Plenarty* by six months after institution is a good plea against the Queen Consort; although she claims the benefice, of the King's endowment. *Wood's Inst.* 160. Upon collation of a bishop by lapse, *Plenarty* is not pleadable; for the collation doth not make a *Plenarty*, by reason the bishop would be judge in his own cause: the bishop must certify whether the church is full, or not; and his collation is interpreted to be no more than to supply the cure till the patron doth present; and it is for this cause a *Plenarty* by collation cannot be pleaded against the right patron: but, by collation, *Plenarty* may be a bar to any lapse of the Archbishop, and to the King, though it is no bar to the right patron. *6 Rep.* 50: *Co. Litt.* 344: *Cro. Jac.* 207. *Plenarty* or not shall be tried by the Bishop's certificate, being acquired by institution, which is a spiritual act; but in a *quare impedit* the *Plenarty* must be tried by a jury. *6 Rep.* 49.

By the Common Law, where a person is presented, instituted, and inducted to a church, the church is full, though the person presented be a layman; and shall not be void, but from the time of the deprivation of the incumbent for his incapacity. *Count. Pars. Comphan.* 99. See titles *Advowson*; *Parson*; *Quare Impedit*.

PLENE ADMINISTRAVIT. A plea pleaded by an executor or administrator, where they have administered the deceased's estate

faithfully and justly before the action brought against them. See title *Executor* VI. 1, 2.

PLIGHT, An old *English* word, signifying sometimes the estate, with the habit and quality of the land; and extends to rent-charge, and to a possibility of dower. *Co. Litt.* 221. *b.*

PLONKETS, A kind of coarse woollen cloth. See *stat.* 1 *R.* 3. *c.* 8.

PLOW-ALMS, *Eleemosyna aratrales.*] Antiently 1*d.* paid to the church for every plow-land. *Mong. Angl.* i. 256.

PLOW-BOTE, A right of tenants to take wood to repair ploughs, carts, and harrows; and for making rakes, forks, &c. See 2 *Comm.* 35.

PLOW-LAND, Is the same with a hide of land; and a hide or Plough-land, it is said, do not contain any certain quantity of acres: but a Plough-land, in respect of repairing the highway was settled at 50*l.* a year, by the statute 7 & 8 *W.* 3. *c.* 29.

PLOW-SILVER, In former times, was money paid by some tenants, in lieu of service to plow the lord's lands. *W. Jones*, 280. See titles *Socage; Tenure.*

PLURALITY, *Pluralitas.*] Signifies the plural number; mostly applied to such clergymen who have more benefices than one: and *Selden* mentions trialities and quadralties, where one person hath three or four livings. *Seld. Tit. Hon.* 687.

Plurality of livings is, where the same person claims two or more spiritual preferments, with cure of souls; in which case the first is void *ipso facto*, and the patron may present to it, if the clerk be not qualified by dispensation, &c.; for the law enjoins residence, and it is impossible that the same person can reside in two places at the same time. *Count. Pars. Compan.* 94.

By the Canon Law, no ecclesiastical person can hold two benefices with cure *simul & semel*; but that upon taking the second benefice, the first is void: but the *Pope*, by usurpation, did dispense with that law; and, at first, every Bishop had power to grant dispensations for Pluralities, till it was abrogated by a general Council, held *anno* 1273, and this constitution was received till the statute 21 *H.* 8. *c.* 13. *Moor* 119.

By *stat* 21 *H.* 8. *c.* 13. if any parson having one benefice with cure, of the yearly value of 8*l.* or above, in the King's books, accept of another benefice with cure, and is instituted and inducted, the first benefice is declared void: so that there may be a Plurality within the statute; and a Plurality by the Canon Law. 2 *Lutw.* 1306.—By 36 *Geo.* 3. *c.* 83. curacies augmented by Queen *Anne's* bounty are to be considered as benefices.

The power of granting dispensations to hold two benefices with cure, &c. is vested in the King by the aforesaid statute: and it has been adjudged, that a dispensation is not necessary for a Plurality, where the King presents his chaplain to a second benefice; for such a presentment imports a dispensation, which the King hath power to grant, as supreme Ordinary; but if such a chaplain be presented to a second benefice by a subject, he must have a dispensation, before he is instituted to it. 1 *Salk.* 161.

The Archbishop's dispensation and King's confirmation regularly are necessary to hold Pluralities: and the statute 21 *H.* 8. *c.* 13. ought to be construed strictly, because it introduces non-residence, and Plurality of benefices, against the Common Law. *Jenk. Cent.* 272.

A man, by dispensation, may hold as many benefices, without cure, as he can get; and likewise so many, with cure, as he can get, all of them, or all but the last, being under the value of *8l. per annum* in the King's books: if the person to be dispensed withal, be not incapable thereof. Yet if a dispensation is made to hold three benefices with cure, whereof the first is of the yearly value of *8l.* the dispensation is void, unless it be in case of the King's chaplains, &c. who may hold three benefices with cure, above the value of *8l.* a year, where one of them is in the King's gift. *Hob.* 148.

If there be two parsons of one church, and each parson hath the intire cure of the parish, and their benefices be severally of the value of *8l. per annum*, if one dies and the other succeeds, this is a Plurality within the statute. *Cro. Car.* 456. And though the act mentions instituted and inducted, when one is instituted into the second church, the dispensation to hold two benefices comes too late; though he be afterwards inducted; for, by institution, the church is full of the incumbent. 4 *Rep.* 79.

By the statute, if the first benefice be of the value of *8l.* a year, or more, by the acceptance of a second, it is actually void, to all intents: but benefices under that value, being not within the statute, are only avoidable by accepting a second, and not void on such Plurality, without a declaratory sentence, &c. *Mallor. Q. Imped.* 104. In these cases it hath been held, that the value of livings, to make pluralities, shall be determined by the King's books in the First-fruits office: though the Court hath been divided, whether the value should be taken as it was in the King's books, or according to the true value of the living. 2 *Lutw.* 1301. See further this Dictionary, titles *Parson; Chaplain; Advowson.*

PLURIES, A writ that issues in the third place, after two former writs have been disobeyed. See title *Capias.*

POCKET SHERIFF, A person appointed by the King himself to be Sheriff who is not one of the three nominated in the exchequer. See title *Sheriff.*

POCKET OF WOOL. A quantity of wool, containing half a sack. 3 *Inst.* 96.

POINDING, the *Scotch* term for taking goods, &c. in execution, or by way of distress. It is defined to be "the diligence (process) which the Law hath devised for transferring the property of the Debtor to the Creditor in payment of his debt." It is either real or personal: not that any inheritance is conveyed by poinding; but real poinding is a power of carrying off the effects on the ground in payment of such debts as are *debita fundi*, or heritable: Personal poinding is the poinding of moveables for debt, or for rent, &c. There is also a species of poinding by attaching cattle trespassing. See *stat.* 33 *Geo.* 3. c. 74. § 5. and this Dict. title *Distress.*

POISON. The killing a person by poisoning was, heretofore, held more criminally than any other murder, because of its secrecy, which prevents all defence against it; whereas most open murders give the party killed some opportunity of resistance. For this reason offenders, guilty of poisoning any person, were antiently judged to a severer punishment than other offenders. See 3 *Nels. Abr.* 363.

Richard Roose (otherwise *Cooke*) was attainted of High Treason, for putting poison into a pot of pottage boiling in the Bishop of *Rochester's* kitchen, by which two persons were poisoned; and there

was a particular statute made for his punishment, *viz.* by the statute 22 H. 8. c. 9. it was enacted, that he should be boiled to death: and that in future wilful murder by poisoning should be adjudged *Treason*—but this act was repealed by the general operation of the acts of *Edw. VI.* and *Queen Mary*, repealing all new treasons. See title *Treason*.

By 43 G. 3. c. 58. any person administering poison with intent to murder another, or to procure the miscarriage of a woman quick with child, is declared guilty of Felony without Clergy: and persons administering medicines to procure miscarriage, though the woman is not quick with child, are declared guilty of Felony, punishable by imprisonment or transportation.

If a man persuade another to drink a poisonous liquor, under the notion of a medicine, who afterwards drinks it in his absence; or if *A.* intending to poison *B.* put Poison into a thing, and deliver it to *D.* who knows nothing of the matter, to be by him delivered to *B.* and *D.* innocently delivers it accordingly, in the absence of *A.*; in this case the procurer of the felony is as much a principal, as if he had been present when it was done. And so likewise all those seem to be, who are present when the Poison was infused, and privy and consenting to the design; but persons who only abet their crime by command, counsel, &c. and are absent when the Poison was infused, are accessaries only. 2 Hawk. P. C. c. 29. § 11. See further titles *Accessory*; *Homicide*.

POLE; see *Perch*.

POLEIN, Was a shoe, sharp or picked, and turned up at the toe; it first came in use in the reign of *William Rufus*, and by degrees became of that length, that in *Richard the Second's* time they were tied up to the knees with gold or silver chains: they were restrained Anno 4 Ed. 4, but not wholly laid aside till the reign of *Hen. VIII.* See *Malms. in Vit. Wil. 2.*

POLICE, not improbably from Πολις, a city.] The term public Police and Œconomy is applied by *Blackstone* to signify the due regulation and domestic order of the kingdom: but is more generally applied to the internal regulations of large cities and towns, particularly of the Metropolis; whereby the individuals of the State, generally speaking, or of any town or city within itself, like members of a well governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective situations. See 4 Comm c. 13. p. 162.

The Police of the Metropolis (says an author who has written on this subject with great accuracy and after much research) is a system highly interesting to be understood: but a vast proportion of those who reside in the capital, as well as the multitude of strangers who resort to it, have no accurate idea of the principles of organization, which move so complicated a machine: establishing those conveniences and accommodations, and preserving that regularity which prevails, in the particular branches of Police which may be denominated *Municipal Regulations*. These relate to *paving, watching, lighting, cleansing, and removing nuisances; furnishing water; the mode of building houses; the system established for extinguishing fires; and for regulating coaches, carts, and carriages; with a variety of other useful improvements tending to the comfort and conveni-*

ence of the inhabitants. See a *Treatise on the Police of the Metropolis*, 8vo, 1796.

To administer that part of the Police which is connected with the prevention and suppression of *crimes*, twenty-six magistrates, namely, the Lord Mayor and Aldermen, sit in rotation every forenoon, and take cognizance of all complaints within the antient jurisdiction of the city of *London*. See this Dictionary, title *London*.

For every other part of the metropolis, twenty-four stipendiary magistrates are appointed; *three* at *Bow-street*, under a jurisdiction long established; and *twenty-one*, first established by *stat. 32 Geo. 3. c. 53.* (generally called the *Police-Act.*) This act was repealed, and other provisions of a similar nature were enacted by *42 G. 3. c. 76.* *47 G. 3. c. 42.* These twenty-one magistrates have seven different offices or Courts of Justice assigned them, at convenient distances, in *Westminster*, *Middlesex*, and *Surrey*; where they sit every day, (*Sundays* excepted,) both in the morning and evening, for the purpose of executing those multifarious duties, connected with the office of a Justice of Peace, which occur in large societies. This institution was suggested to the legislature in consequence of the pressure felt by the public from the want of some regular tribunals, where the system should be uniform, and where the purity of magistrates, and their regular attendance, might insure to the lower orders of the People, the adjustment of their differences, at the least possible expence; and the assistance of gratuitous advice in every difficulty, as well as official aid, in all cases within the sphere of the magistrate.

Similar provisions are made to prevent depredation on the *Thames*, by the acts *39 & 40 G. 3. c. 87; 42 G. 3. c. 76, & 47 G. 3. st. 1. c. 37.* usually called the *Thames Police Acts.*

The duty of these stipendiary magistrates (in conjunction with the county magistrates) extends also to several judicial proceedings, where, in various instances, they are empowered and required to hear and determine offences in a summary way; particularly in cases relating to the *customs* and *excise*; *game-laws*; *hawkbroskers*; *labourers*; and *apprentices*, &c. They act ministerially in licencing and regulating *public-houses*; punishing *vagrants*; removing the *poor*, &c. &c. And examine into complaints in criminal cases, capital and others, for the purpose of sending them to superior tribunals for trial.

These extensive duties, and others, which it is to be wished these magistrates could perform towards the *prevention* of crimes, the author of the above treatise thinks would be much facilitated, by the establishment of a fund, from whence to bestow rewards on constables and others for detecting, and on accomplices for discovering, offenders.

The following abstract of the *Civil Municipal Regulations* of the Police of the Metropolis above alluded to, and the various statutes by which they are regulated, is extracted, and corrected from the same author:

The Metropolis having by degrees been extended so far beyond its antient limits, every parish, hamlet, liberty, or precinct, now contiguous to the cities of *London* and *Westminster*, may be considered as a separate municipality; where the inhabitants regulate the Police of their respective districts, raise money for paving the streets, and assess the householders for the interest thereof, as well as for

the annual expence of watching, cleansing, and removing nuisances and annoyances. These funds, as well as the execution of the powers of the different statutes creating them, (excepting where the interference of magistrates is necessary) are placed in the hands of trustees; of whom, in many instances, the Churchwardens or parish officers, for the time being, are members *ex officio*; and, by these different bodies, all matters relating to the immediate safety, comfort, and convenience of the inhabitants, are managed and regulated; under the provisions of statutes made in the last and present reign, as well public as private, applicable to the Metropolis in general, and to the various parishes, hamlets, and liberties in particular; former statutes for these purposes having been found inadequate.

The *stat. 10 Geo. 2. c. 22*, established a system for paving, lighting, cleansing, and watching the city of *London*; but the statute which removed signs and sign-posts, balconies, spouts, gutters, and those other encroachments and annoyances which were felt as grievances, by the inhabitants, did not pass till the year 1771. The *stat. 11 Geo. 3. c. 29*, contains a complete and masterly system of that branch of the Police which is connected with municipal regulations; and may be considered as a model for every large city in the Empire. This statute extends to every obstruction by carts and carriages, and provides a remedy for all nuisances which can prove, in any respect, offensive to the inhabitants; and special Commissioners, called Commissioners of Sewers, are appointed to ensure a regular execution. This statute is improved by *stat. 33 G. 3. c. 75*; by which the power of the Commissioners is increased, and some nuisances, arising from butchers, dustmen, &c. further provided against.

Various acts are from time to time passed for local improvements in streets, squares, docks, &c.

In the city and liberty of *Westminster* also many new and useful municipal regulations have been made within the present century. The *stats. 27 Eliz. and 16 Car. 1.* (private acts,) divided the city and liberties into twelve wards, and appointed twelve burgesses to regulate the Police of each ward, who, with the Dean or High Steward of *Westminster*, were authorized to govern this district of the Metropolis.

The *stat. 29 Geo. 2. c. 25*, enabled the Dean or his High Steward to choose eighty constables in a court-leet; and the same act authorized the appointment of an Annoyance-Jury of forty-eight inhabitants, to examine weights and measures, and to make presentments of every public nuisance either in the city or liberty. The *stat. 31 Geo. 2. cc. 17. 25*, improved the former statute, and allowed a free market to be held in *Westminster*. The *stat. 2 G. 3. c. 21*, amended by *stat. 3 G. 3. c. 23*, extended and improved the system for paving, cleansing, lighting, and watching the city and liberty, by including six other adjoining parishes and liberties in *Middlesex*. The *stats. 5 Geo. 3. cc. 13. 50*; *11 Geo. 3. c. 22*; and particularly *14 Geo. 3. c. 90*, for regulating the nightly watch and constables, made further improvements in the general system; by which those branches of Police in *Westminster* are at present regulated. See also, *44 G. 3. c. 61*; *45 G. 3. c. 113*; *46 G. 3. c. 89*, and *48 G. 3. c. 137*, under which many improvements have been made in *Westminster*, with a view to the convenience and dignity of the Courts of Justice and Houses of Parliament.

In the borough of *Southwark* also, the same system has been pursued: the *stats.* 28 *Geo.* 2. c. 9; 6 *Geo.* 3. c. 24, having established a system of regulation applicable to this district of the Metropolis; relative to markets, hackney-coach stands, paving, cleansing, lighting, watching, marking streets, and numbering houses; and placing the whole under the management of Commissioners.

In contemplating the great leading features of municipal regulation, nothing places *England* in a situation so superior to most others, with regard to cleanliness, as the system of the *Sewers*; under the management of special Commissioners in different parts of the kingdom; introduced so early as by *stat.* 6 *H.* 6. c. 5; and organized by *stats.* 6 *H.* 8. c. 10: 23 *H.* 8. c. 5: 25 *H.* 8. c. 10; afterwards improved by *stats.* 3 & 4 *E.* 6. c. 8: 1 *M. st.* 3. c. 11: 13 *Eliz.* c. 9: 3 *Jac.* 1. c. 14: 7 *Ann.* c. 10. See this dictionary, title *Sewers*.

Sewers being early introduced into the Metropolis, as well as other cities and towns, in consequence of the general system, every offensive nuisance was removed through this medium; and the inhabitants early accustomed to the advantages and comforts of cleanliness.

Another feature, strongly marking the wisdom and attention of our ancestors, was the introduction of *water*, for the supply of the Metropolis, in the reign of King *James I.* in 1604. The improvements which have been since made, in extending the supplies, by means of the *New River*, and also by the accession of the *Thames* water through the medium of the *London-bridge*, *Chelsea*, *York-buildings*, *Shadwell*, and other water-works, it is not necessary to detail.

The *stat.* 9 *Ann.* c. 23, first established the regulations with regard to *hackney-coaches* and chairs, which have been improved and extended by several subsequent statutes; see title *Coaches*; and *stat.* 33 *Geo.* 3. c. 75. § 15—19, which enlarges the power of the magistrates of the city of *London*, to compel the appearance of hackney coachmen residing out of their immediate jurisdiction.

Carts and other carriages have also been regulated by different statutes, *viz.* *stats.* 1 *Geo.* 1. *stat.* 2. c. 57: 18 *Geo.* 2. c. 33: 24 *Geo.* 2. c. 43: 30 *Geo.* 2. c. 22: 7 *Geo.* 3. c. 44: 24 *Geo.* 3. *st.* 2. c. 27; which contain a very complete system relative to this branch of Police: by virtue of which, all complaints arising from offences under these acts are cognizable by the magistrates in a summary way.

The *stat.* 34 *Geo.* 3. c. 65, established an improved system with regard to *Watermen* plying on the river *Thames*. The Lord Mayor and Aldermen are empowered to make rules and orders for their government; and with the Recorder of the city, and Justices of the Peace of the respective counties and places next adjoining to the *Thames*, between *Gravesend* and *Windsor*, have power, within those districts, to put in execution not only the *laws*, but also the rules and orders to be from time to time made by them relative to such watermen: such rules and orders to be from time to time sent to the public office in the Metropolis, and to the clerks of the peace of the counties joining the *Thames*, within thirty days after they are made or altered. The Magistrates have power given them to fine watermen for extortion and misbehaviour; and persons refusing to pay the legal fares may be compelled so to do with all charges, or be imprisoned for a month; and persons giving watermen a fictitious name or place of abode shall forfeit 5*l.* See *Watermen*.

Offences relative to the driving of *cattle* improperly, usually termed Bullock-hunting, are also determinable by the magistrates in the same summary way, under the authority of *stat. 21 Geo. 3. c. 67*; by which every person is authorized to seize delinquents guilty of this very dangerous offence.

The last great feature of useful Police to be here mentioned, consists in the excellent regulations relative to *buildings*, projections, and *fires*: first adopted after the fire of *London* in 1666; and extended and improved by several statutes from that time down to the *stat. 14 Geo. 3. c. 78*. This statute repeals all former acts, and besides regulating the mode of building houses in future, so as to render them ornamental, commodious, and secure against the accidents of fire, established other useful rules for the prevention of this dreadful calamity; by rendering it incumbent on the churchwardens to provide engines and ladders; to fix fire plugs at convenient distances on all the main pipes in the parish; to fix a mark in the street where they are to be found, and where there is a key ready to open the plugs: rewards are also payable to persons bringing the engines to a fire. See this Dictionary, title *Fire*.

These outlines will explain, in some measure, by what means the system of the Police in most of its great features, is conducted in the metropolis: to which it may be necessary to add, that the *Beadles* of each parish are the proper persons to convey informations, in case of any inconvenience or nuisance, by which a stranger may have it removed. The City and Police Magistrates, in their respective courts, if not immediately authorized to remedy the wrong complained of, will point out how it may be effected.

It is however earnestly to be wished, that one general act, comprehending the whole of the regulations made for the city of *London*, so far as they will apply, could be extended to every part of the Metropolis and its suburbs; that a perfect uniformity might prevail in the penalties and punishments for the several offences against the comfort and convenience of the inhabitants.

POLICY OF ASSURANCE, or Insurance, from the *Ital. Polizza*, i. e. *schedula & assicuratio*.] An instrument entered into by insurers of ships and merchandise, &c. to merchants, obligatory for the payment of the sum insured, in case of loss. *Merch. Dict.* See title *Insurance*.

POLLARDS, or Pollengers. Such trees as have been usually cropped, therefore distinguished from timber-trees. *Plowd.* 469.

POLL. A deed poll is distinguished from one indented, the latter being polled or shaved quite even. See *Deed*.

POLLS. Where one or more jurors are excepted against, it is called a challenge to the Polls. *Co. Lit.* 156. See title *Jury*.

POLL-TAX, A tax formerly not unfrequently assessed by the head on every subject according to their respective ranks. See title *Taxes*.

POLYGAMY, *Polygamia*.] The having a plurality of wives or husbands at once. See title *Bigamy*; To which is here to be added, that by *stat. 35 Geo. 3. c. 67*, persons convicted of Bigamy, are made subject to the penalty inflicted on *Larceny*, i. e. transportation, &c.

PONDUS, Poundage; which duty, with that of tonnage, was antiently paid to the King according to the weight and measure of merchants' goods. *Corwell*.

PONDUS REGIS, The standard weight appointed by our antient Kings. And what we now call *Troy Weight*, was this *Pondus Regis*, or *Le Roy Weight*, with the scales in *equilibrio*: whereas the *aver du pois* was the fuller weight, with a declining scale. *Cowell*. See titles *Troy Weight*; *Weights*.

PONE, A writ whereby a cause depending in the county, or other inferior Court, is removed into the Common Pleas; and sometimes into the King's Bench: as when a replevin is sued by writ out of Chancery, &c. then if the plaintiff or defendant will remove that plea out of the county-court into *C. B.* or *K. B.* it is done by *Pone*. *F. N. B.* 4, 69: 2 *Inst.* 339. The writ *Pone* lies to remove actions of debt, and of detinue, writ of right, of nuisance, &c. *New Nat. B. R.*

A *Pone* to remove causes is of this form: *PUT at the petition of A. B. before our Justices at Westminster, the day, &c. the plea which is in your Court by our writ, between the said A. B. and C. D. of, &c. and summon the said C. that he be then there to answer the said A. &c.* This form is only applicable to the Common Pleas: but if the writ of *Pone* be to remove a cause into *K. B.* it should be worded thus: *PUT at the petition of, &c. before us, wheresoever, &c. the plea, &c.*

Pone is also a writ willing the Sheriff to summon the defendant to appear and answer the plaintiff's suit on his putting in sureties to prosecute: it is so called from the words of the writ, *Pone per vadium & salvos plegios*; "PUT, by gage and safe pledges, *A. B.* the defendant." This is a writ not issuing out of chancery, but out of the Court of Common Pleas, being grounded on the non-appearance of the defendant, at the return of the original writ: and thereby the Sheriff is commanded to attach him, by taking gage, that is certain of his goods, which he shall forfeit if he doth not appear; or by making him find safe pledges or sureties, who shall be amerced in case of his non-appearance. *Finch. L.* 345: *Ld. Raym.* 278: *Dalt. Sher. c.* 32. See title *Process*.

This is also the *first* and immediate process, without any previous summons, upon actions of trespass *vi et armis*, or for other injuries which, though not forcible, are yet trespasses against the peace, as *deceit* and *conspiracy*; where the violence of the wrong requires a more speedy remedy; and therefore the original writ commands the defendant to be at once attached without any precedent warning. 3 *Comm. c.* 19. *p.* 280, cites *Finch. L.* 305. 351. See title *Original*.

PONENDIS IN ASSISIS, A writ granted by the statute of *Westm.* 2. 13 *E. 1. st.* 1. *c.* 38; which statute shews what persons sheriffs ought to impanel upon assises and juries. *Reg. Orig.* 175: *F. N. B.* 165. See title *Jury*.

PONENDUM IN BALLIUM, A writ commanding that a prisoner be bailed in cases bailable. *Reg. Orig.* 133.

PONENDUM SIGILLUM AD EXCEPTIONEM, A writ by which justices are required to put their seals to exceptions, exhibited by defendant against the plaintiff's evidence, verdict, or other proceedings before them, according to the statute *Westm.* 2. 13 *E. 1. st.* 1. *c.* 31. See title *Bill of Exceptions*.

PONE PER VADIUM; See *Pone*.

PONTAGE, *Pontagium*.] A contribution towards the maintenance, or re-edifying bridges. *Stat. Westm.* 2. *c.* 25. It may also signify toll taken to this purpose of those who pass over bridges. *stats.* 1. *Hen.* 8. *c.* 9: 22 *Hen.* 8. *c.* 5, 39 *Eliz.* *c.* 25. See *Trinoda Necessitas*.

PONTIBUS REPARANDIS, A writ directed to the Sheriff, &c. requiring him to charge one or more, to repair a bridge, to whom it belongeth. *Reg. Orig.* 153. See *Pontage*.

POOR.

PAUPER.] A poor person, who is a burden and charge upon a parish.

The Poor our Law takes notice of are, 1st, Poor by *impotency* and defect; as the aged or decrepid fatherless or motherless; Poor under sickness, and persons who are Idiots, Lunatics, lame, blind, &c. these the Overseers of the Poor are to provide for.

2dly, Poor by casualty, such as House-keepers, decayed or ruined by unavoidable misfortunes: poor persons overcharged with children; labourers disabled; and these, having ability, are to be set to work; but if not able to work, they are to be relieved with money.

3dly, Poor by prodigality and debauchery, also called thriftless Poor; as idle slothful persons, pilferers, vagabonds, strumpets, &c. who are to be sent to the House of Correction, and be put to hard labour, to maintain themselves; or work is to be provided for them, that they do not perish for want; and if they become impotent by sickness, or if their work will not maintain them, there must be an allowance by the Overseers of the Poor for their support. *Dalt. c. 73. s. 35.*

The Law not only regards life and member, and protects every man in the enjoyment of them, but also furnishes him with every thing necessary for their support. For there is no man so indigent or wretched, but he may demand a supply sufficient to all the necessities of life, from the more opulent part of the community, by means of the several statutes enacted for the relief of the Poor. *1 Comm.* 131.

The Poor of *England*, till the time of *Henry VIII.* subsisted entirely upon private benevolence and the charity of well-disposed Christians: and the Poor in *Ireland* have, to this day, no relief except from private charity.—By an antient statute, 23 *E. 3. c. 7*, it was enacted, that none should give alms to a beggar able to work.—It appears by the *Mirror*, that at the Common Law the Poor were to be “sustained by parsons, rectors of the church, and the parishioners; so that none of them die for default of sustenance.” *Mirr. c. 1. § 3.*—And by *stats. 15 R. 2. c. 6: 4 H. 4. c. 12.* improPRIATORS were obliged to distribute a yearly sum to the poor parishioners: and to keep hospitality. (See titles *Parson; ImproPRIATORS.*)—By *stats. 12 R. 2. c. 7: 19 H. 7. c. 12*, the Poor were directed to abide in the cities and towns wherein they were born, or such wherein they had dwelt for three years: which seems to be the first rudiment of parish settlements.

No compulsory method, however, was marked out for the relief of the Poor, till the *stat. 27 H. 8. c. 25*; under which, provision was ordered to be made for the impotent Poor.—Before that time, the Monasteries were their principal resource; and among other bad effects, which attended these institutions, it was not perhaps one of the least, (though frequently esteemed quite otherwise,) that they supported and fed a very numerous and very idle Poor; whose sustenance depended upon what was daily distributed in alms at the gates of the Religious Houses. But upon the total dissolution of these, the incon-

venience of thus encouraging the Poor in habits of indolence and beggary, was quickly felt throughout the kingdom; and abundance of statutes were made in the reign of King *Henry VIII.* and his children, for providing for the Poor and impotent; which, the preambles to some of them recite, had of late years greatly increased. These Poor were principally of two sorts; sick and impotent, and therefore unable to work; idle and sturdy, and therefore able, but not willing to exercise any honest employment. To provide, in some measure, for both of these, in and about the Metropolis, *Edward VI.* founded three Royal Hospitals; *Christ's* and *St. Thomas's*, for relief of the impotent, through infancy or sickness; and *Bridewell*, for the punishment and employment of the vigorous and idle. But these were far from being sufficient for the care of the Poor throughout the kingdom at large: and therefore, after many other fruitless experiments, by *stat. 43 Eliz. c. 2*, *Overseers of the Poor* were appointed in every parish; whose office and duty are principally these: *first*, to raise competent sums for the necessary relief of the Poor, impotent, old, blind, and such other being poor, and not able to work, and them only; and, *secondly*, to provide work for such as are able and cannot otherwise get employment: but this latter part of their duty, which, according to the wise regulations of that salutary statute, should go hand in hand with the other, is now most shamefully neglected. 1 *Comm. c. 9. p. 359, 460.*

The learned Commentator then proceeds to state the evils arising from what, he considers as a deviation from the original purpose of the Poor Laws, by accumulating all the Poor in one Workhouse; a practice which he condemns as destructive of the industry and domestic happiness of the Poor. He also reprobates the sub-division of parishes; the plan of confining the poor to their respective districts; and the laws passed since the Restoration; as having given birth to the intricacy of our Poor Laws, by multiplying and rendering more easy the methods of gaining settlements: and, in consequence, creating an infinity of expensive Law-suits between contending neighbourhoods, concerning those settlements and removals. He then proceeds to state the general heads of the Law relative to the settlement of the Poor; which, he truly observes, by the resolutions of the Courts of Justice thereon, within a century past, are branched into a great variety. "And yet, he concludes, notwithstanding the pains that have been taken about these Laws, they still remain very imperfect, and inadequate to the purposes they are designed for: a fate that has generally attended most of our statute Laws, where they have not the foundation of the Common Law to build upon. When the Shires, the Hundreds, and the Tithings were kept in the same admirable order in which they were disposed by the great *Alfred*, there were no persons idle, consequently, none but the impotent that needed relief: and the *stat. 43 Eliz. c. 2.* seems entirely founded on the same principle. But when this excellent scheme was neglected and departed from, we cannot but observe, with concern, what miserable shifts and lame expedients have from time to time been adopted, in order to patch up the flaws occasioned by this neglect. There is not a more necessary or certain maxim, in the frame and constitution of Society, than that every individual must contribute his share, in order to the well-being of the Community; and surely they must be very deficient in sound policy, who suffer one half of a

parish to continue idle, dissolute, and unemployed; and at length are amazed to find that the industry of the other half is not able to maintain the whole." 1 *Comm. c. 9. ad finem.*

In *Scotland* the Poor are distinguished into the *idle* and the *infirm*. Several acts have been made for the punishment of sturdy beggars and vagabonds, by whipping, and burning in the ear. Those who from age or infirmities are unable to maintain themselves, are maintained by a tax levied on the parish.—Birth is the original rule of settlement; but which may be superceded by three years' continued residence in any other parish. The collection and management of the poor's fund is placed in the Heritors and Kirk session. In parishes where a sufficient fund cannot be raised for all the Poor, either by taxation or voluntary contribution at the Church-doors, the Magistrates are authorised to give them badges as a warrant to ask alms within the limits of their parishes. See *Bell's Scotch Dict.*

In *Ireland*, by the *Irish Act 11 & 12 Geo. 3. c. 30.* a Corporation is erected in every county, county of a city and town, of which the Bishop and Member of Parliament are presiding members: and who are empowered to relieve poor parish vagabonds, to apprentice children, &c. with great discretionary powers, which are varied and enlarged by several subsequent acts, as well local as general.

In 1803 an act was passed, 43 *Geo. 3. c. 144.* for procuring returns relative to the expence and maintenance of the Poor in *England*. Returns were made accordingly, from which it appeared that the expence exceeded three millions annually.—No effectual steps have yet been taken for decreasing this expence, or for securing the more effectual application of so large a fund.

After the observations quoted from the Commentaries with respect to the Poor Laws in *England*, it may seem a hopeless, and almost an useless, task, to enter into any detail of them. This has, however, been here attempted: the source from which the following Abridgment has been chiefly drawn, is Mr. *Const's* enlarged and valuable editions of *Bott's Poor Laws*; to which, and *Burn's Justice*, title *Poor*, the studious Inquirer into particulars should refer.

I. Of OVERSEERS OF THE POOR.

1. *Their Appointment.*
2. *Their Accounts.*
3. *Their Indemnity and Punishment.*

II. Of POOR-RATES.

1. *What Persons and Property are liable to.*
2. *The Manner and Purpose of raising them.*
3. *Of Appeals against them.*
4. *How to be levied; and of rating in Aid.*

III. 1. Of relieving and maintaining the Poor.

2. *Of Relations maintaining each other.*

IV. Of the SETTLEMENTS of Poor People.

1. *By Birth.*
2. *By Parentage.*
3. *By Marriage.*
4. *By Residence, in particular Cases.*
5. *By renting a Tenement.*
6. *By Payment of public Taxes.*

7. *By serving an Office.*
8. *By Hiring and Service.*
9. *By Apprenticeship.*
10. *By Estate.*

V. *Of Certificates.*

VI. *Of the Removal of Poor Persons.*

I. 1. THE CHURCHWARDENS of every parish, and *four, three, or two* substantial householders there shall be nominated yearly in *Easter-Week*, or within a month after *Easter*, under the hands and seals of two Justices of the County, to be *Overseers* of the Poor of that parish. *Stat. 43 Eliz. c. 2. § 1.*

In the counties of *Lancashire*, and others specified, and many (any) other counties, where, by reason of the largeness of the parishes, they (the parishes) cannot reap the benefit of the said *stat. 43 Eliz. c. 2. two or more* Overseers shall be yearly chosen and appointed, according to the directions of the said *stat. 43 Eliz.* within every *township* or *village* within such county. *Stat. 13 & 14 Car. 2. c. 12. § 21.* This statute extends to towns and villages, in extra-parochial places, as well as within parishes; and, by an equitable construction to all counties, though not named in the statute. An appointment of one overseer only for a township is bad, the statute requiring at least two. *2 East's Rep. 168.*

If any Overseer so appointed shall die, or remove from the place, or become insolvent before the expiration of his office, two Justices, on oath made thereof, may appoint another in his stead, until new Overseers are appointed. *Stat. 17 Geo. 2. c. 38. § 3.*

The Mayor and Magistrates of every city, being Justices of the Peace, shall have the same authority, within their respective jurisdictions, as is given to two or more Justices of the Peace. *Stat. 43 Eliz. c. 2. § 8.* If any parish happen to extend into more counties than one, or part to lie within a city, and part without, the Magistrates of the city and Justices of the County shall only intermeddle in so much of the parish as lies within their several jurisdictions respectively; but the Churchwardens and Overseers of such parish shall nevertheless duly execute their office, without dividing themselves, in all places within the said parish. § 9.—If, in any place, there be no nomination of Overseers, every Magistrate in the division, and every Mayor, Alderman, and head officer of the Corporation, where the default shall happen, shall forfeit *5l.* § 10.

In stating the determinations which have been made by the Courts, in explanation of the above statutes, and the several others hereafter referred to, it would be too minute a labour to quote every authority. Mr. *Const.* as well as Mr. Justice *Burn.* and his Continuators, having so carefully and accurately gone over the whole subject, an abridgment of the decisions related by them must, in the first instance, be considered as sufficient. When it is necessary to examine more minutely, recourse must be had to those authors: and to the cases which they have given so much at length, as generally to preclude the necessity of consulting any other Reports.

The appointment must expressly state, that the persons named in it are appointed "Overseers of the Poor." It must also state, that they are "substantial householders there," that is, within the parish: and

the county in which the parish lies must be named. An appointment to a *precinct* is not good: but an appointment to a *hamlet* is: the appointment need not state the Justice to be of the division; or that one of the Justices is of the Quorum. *Stat. 26 Geo. 2. c. 27.*

All persons, of whatever age or sex, are *prima facie* liable to serve, unless they can shew some legal exemption to except them out of it. Thus it is said, that all Peers of the Realm, by reason of their dignity; Clergymen, by reason of their order; Members of Parliament, by reason of the privileges of Parliament; and Attornies, by reason of the necessity of their attendance at *Westminster-Hall*; are exempted from being chosen Overseers, even where there is a special custom in the parish for every inhabitant to serve; it is admitted that practising Barristers also have the same privilege, for the like reason. It has also been held, that an Alderman of *London* ought to be discharged from serving parish offices, on account of his necessary attendance on the duties of the Corporation. Persons also of particular professions and descriptions are exempted, by divers statutes, from serving the office of Overseer. The President and members of the College of Physicians, in *London*. *Stat. 32 H. 8. c. 40.* Surgeons, being freemen of the Corporation of Surgeons, in *London*, for so long a time as they shall practise. *Stat. 18 Geo. 2. c. 15.* And it is said, that Surgeons in general are exempted, by special custom, at Common Law. Apothecaries, free of the Apothecaries' Company, and every person using and exercising the said art, who has served as an *apprentice* to it for seven years, while they practise. *Stat. 6 & 7 W. 3. c. 4.* Dissenting Ministers, who shall conform to the directions of the Toleration Act, *stat. 1 W. & M. c. 18*; and Dissenters in general, are allowed to serve the office by deputy. See title *Dissenter*. Prosecutors of felons, to conviction, who shall apprehend and take any person guilty of burglary, or privately stealing from the shop. *Stat. 10 & 11 W. 3. c. 33.* See title *Reward*. Soldiers, serving in the militia during the time of service. *Stat. 26 Geo. 3. c. 107. § 103.*—And, perhaps, it may be considered, that those who are exempted from serving the office of *Churchwarden*, are also exempted from serving the office of *Overseer*: See this Dictionary, title *Churchwarden*. It has also been said, that persons who are only occasional residents in a parish, ought not to be appointed; and it seems clear, that absentees, or persons who do not reside, but only hold land in the parish, cannot be chosen. But it is settled that a woman, or a Justice of the Peace, or an Officer upon half pay, may be appointed, if there are no other more substantial or proper persons in the parish, who are eligible to the office. But, unless there is a positive exemption, the Justices have a discretionary power, to appoint such persons in the parish, as they think most proper to execute the office.

The appointment of Overseers must be under the hands and seals of two Justices, pursuant to the direction of the *stat. 43 Eliz. c. 2.* and, therefore, it cannot be made by the Sessions, nor by the Mayor of a Corporation, conjointly with the Justice of a County; but, if there should happen to be only one Justice in a county, perhaps he alone may appoint. It is, however, completely determined, that the two Justices must sign and seal the appointment in the presence of each other, for it is not merely a ministerial but a judicial act, wherein the Justices are to exercise their discretion.

The appointment, though made on a *Sunday*, is good, provided it

be within *Easter week* or within a month after; but if the *Sunday* be *Easter Sunday*, the Court will take it to be *firmâ facie* clandestine and bad, but it will be good unless the collusion be made to appear; although *Sunday* is considered as an improper day for making an appointment of Overseers: an order also, appointing Overseers, in obedience to a *mandamus*, is good, although made above a month after *Easter*; so also an appointment of an Overseer *for the year next ensuing* will be understood to be for the Overseer's year.

The Justices cannot appoint more than four Overseers for any parish, unless the parish be divided into two or more divisions or townships, each separately maintaining its own Poor.—After an appointment of four Overseers by Magistrates at one meeting, the Magistrates are *functi officio*; and no other Magistrates can afterwards, upon a claim of exemption by one of the persons so appointed, appoint another in his place: but the party must appeal to the Sessions to get his discharge: and such objection to the second appointment may be disclosed to the Court of K. B. on affidavit upon the removal of the appointment thither by *Certiorari*, and the Court will thereupon quash the appointment. 2 *East's Rep.* 244.

It seems to be settled, that no Overseers can be appointed for any place that is not, in contemplation of Law, a Vill; and therefore, if a place that is extra-parochial come within the notion of a vill, Overseers may be appointed for the purpose of obliging the inhabitants to provide for their own Poor. But it is a subject that has been much litigated what kind of place shall be so considered. *Coke* describes a vill thus: "*Villa est ex pluribus mansionibus vicinata*;" and it seems to be taken generally, that wherever there is a constable; the place over which he presides shall be considered a township. It has been determined, that a place consisting of two houses, or of a castle and an ale-house, or of a capital mansion house, and three keepers' lodges in the parish adjoining, though the lodges were converted into farms, were not vills. The number of houses, however, or the size of the place is not the only distinguishing feature of a vill; for where a place consisted of a capital mansion house, and a large farm house thereto belonging, of the yearly value of 200*l.* and also of three other large farm houses, with three other farms; the Court refused to grant a *mandamus* to appoint Overseers, because it did not appear that the place had ever had a constable, or even been reputed to be a vill. So also it has been determined, that the scites of antient cathedrals, Colleges and Inns of Court, are extra-parochial; and not being vills, either legally or by reputation, cannot have Overseers appointed to them. But if an extra-parochial place be a vill by reputation, it may have Overseers appointed, although it consist only of a mansion house and a farm house, occupied by different persons: and the property of one; and where the Sessions, on an appeal from an appointment of Overseers, adjudge the place to be a vill, this is conclusive; for then it is perfectly immaterial of what number of houses or persons it consists: but if the Sessions set forth the facts upon which their judgment is founded, the court of King's Bench will consider whether they have rightly concluded the place to be a vill.

The Justices ought not to appoint separate Overseers for distinct parts of a parish, under *stat. 13 & 14 Car. 2. c. 12.* unless such separate appointments are necessary; and this necessity can only be evinced by the inability of a parish, to reap the benefit of the *stat. 43 Eliz.*

c. 2; of which inability, the circumstances of a township having, for sixty or seventy years had separate Overseers, and maintained its own Poor, independently of the parish at large, is pregnant evidence; and therefore, where a parish consists of several *townships*, some of which have immemorially maintained their own Poor, the Court will grant a *mandamus* for the appointment of separate Overseers for the remaining townships. And when a parish is thus divided into separate townships, each township is to be considered as a distinct parish. But it is decided, that a parish shall not be thus divided, unless the Sessions *find it as a fact* that the parish could not reap the benefit of the *stat. 43 Eliz. c. 2*: and this in a case where the parish had immemorially been divided into two separate *districts*, making separate rates which were afterwards blended together, and divided in certain proportions; and there had been more than four Overseers; and a Constable for the hamlet part of the parish.

Persons aggrieved by any thing done or omitted by the Churchwardens or Overseers, or the two Justices, may, on giving *reasonable notice* to the Churchwardens, &c. appeal to the next General or Quarter Sessions: and if it shall appear to the Sessions that reasonable notice were not given, they shall adjourn it to the next Quarter Sessions, and then and there finally determine the same, giving reasonable costs, *Stat. 17 Geo. 2. c. 38. § 4*. See title *Sessions*.

The appointment cannot be removed into the Court of K. B. before the time for appealing is expired; for it would deprive the party of his right of appeal. This appeal may be made as well by the parishioners as by the persons who are appointed Overseers.

2. It is provided, that Overseers shall, within *four* days after the end of their year, and after other Overseers nominated, make and yield up to *two Justices*, true and perfect accounts of all monies by them received, or rated and assessed, and not received; and also such stock as shall be in their hands or in the hands of the Poor to work, and of all other things concerning their office; and pay over the balance to the succeeding Overseers. *Stat. 43 Eliz. c. 2. § 2*.—The succeeding Overseers may, by distress, levy the sums of money or stock which shall be behind, upon any account so made; in defect of distress, the offender may be committed to the common gaol until payment of the arrears: *two Justices* may commit Overseers, who shall *refuse* to account, until they make a true account, and pay over the balance in their hands. *§ 4*.

The Overseers shall not bring into their account any money, given to the relief of a poor person, not registered in the parish books, as a person entitled to receive collections, on pain of *5l. Stat. 19 Geo. 1. c. 7. § 2*.

The Overseers shall, within *fourteen* days after other Overseers are appointed, deliver in to *such succeeding Overseers* a true and just account, in writing, fairly entered in a book or books to be kept for that purpose, and signed by the Overseers: such account to be verified on oath before one Justice, who shall sign and attest the caption of the same at the foot of the account; and the Overseers shall deliver over all the stock, and pay the balance, remaining in their hands, to their successors: these books of account to be carefully preserved in some public place; and to be open at all seasonable times to the inspection of any person assessed, and copies thereof delivered, if required. *Stat. 17 Geo. 2. c. 38. § 1*. If any Overseer shall refuse

or neglect to account and pay the balance, as aforesaid, *two* Justices may commit such Overseer until he complies. § 2.—If an Overseer shall remove, he shall previously deliver accounts and papers, and pay the balance aforesaid to the Churchwarden or other Overseer; and if any Overseer shall die, his executors or administrators shall, within forty days after his decease, deliver all things, concerning his office, to the Churchwarden or other Overseer, and pay the balance out of assets, before any of the other debts are paid and satisfied. § 3.—The succeeding Overseers may levy arrears of rates due to their predecessors; and, out of the money, reimburse, to their predecessors, sums expended for the use of the Poor, and which are allowed to be due to them upon their accounts. § 11.

The authority given by the *stat. 43 Eliz. c. 2.* to commit, upon the non-delivery of the account within the time limited, extends only to Overseers, and not to Churchwardens; and if the latter are committed for a default, as overseers, they must be so named. The power of stating and allowing the accounts at the end of the year, must be executed by the Justices themselves; for they cannot delegate any other person to perform this office. The account delivered must be a particular account, and not merely what the Overseer has received and paid in gross; but the Justices cannot commit if an account be actually delivered, though it is objectionable; they must go into it, hear the objections, strike out what is amiss, and balance the account; and if, after the accounts are passed, they appear to be fraudulent, the remedy is to indict the Overseers. After the Justices have examined, they are to allow, the account; and if they refuse to administer the oath prescribed by *stat. 17 Geo. 2. c. 38.* in verification of the account, the Overseer may have a *Mandamus* to compel them. A *Mandamus* will also lie, on behalf of the new Overseers, to compel the old Overseers to deliver over the book of Poor's-rates, and all other public books and papers in their custody relating to the office. Overseers must account *yearly*; although they may be appointed for several years successively.

If any person shall find themselves aggrieved by any act done by the Churchwardens and Overseers, or by the two Justices, they may, by *stat. 43 Eliz. c. 2. § 4.* appeal to the General Quarter Sessions. And also by *stat. 17 Geo. 2. c. 38. § 4.* (See *ante* 1;) if any person shall have any material objection to such account or any part thereof, such person giving *reasonable notice* to the Churchwardens, &c. may appeal to the next General or Quarter Sessions, and the Justices there assembled shall receive such appeal, and finally determine the same.

The sessions, upon an appeal against the allowance of Overseers' accounts, may, if they see reason, disallow of the accounts, and order the Overseers to pay over such balances as they shall adjudge to be due to the parish; but if they refuse so to do, the Sessions cannot commit, but must levy the arrears pursuant to the direction of the *stat. 43 Eliz. c. 2. § 4.* So also the sessions may, upon an appeal, set aside the allowed account, and order a re-examination of the account by two Justices; but the accounts must be previously allowed by two Justices, or the Sessions cannot receive an appeal, and this allowance must appear on the face of the order; but objections may be made to the accounts before the appeal, for the inhabitants are aggrieved as soon as the money is assessed. Great doubts have been entertained

as to the time when the appeal is to be brought; and it has been said, that if the accounts are passed before one Justice, under 17 *Geo. 2. c. 38.*, that the appeal must be to the next Sessions; but that if they are passed before two Justices, under the 43 *Eliz. c. 2.* the appeal may be at any distance of time; but with respect to the Poor's-rate, it has been determined, that the latter statute repeals the former, and therefore the appeal must be in all such cases to the next Sessions, after the publication of the rate.

It has been heretofore doubted how far Overseers who have laid out their money upon the maintenance of the Poor were to be reimbursed after they were out of office. By *stat. 41 G. 3. (U. K.) c. 23. § 9.* Succeeding Churchwardens and Overseers are empowered to reimburse to their predecessors in office any money expended for relief of the Poor, while there was no rate, or during an appeal: and in default of such reimbursement the Quarter Sessions, on application, shall make an order for that purpose.

The balance must be paid over to the succeeding Overseers, notwithstanding a vestry may be willing to let the old overseers retain it, in order to discharge the expenses of a law suit, or a surgeon's bill incurred on account of the Poor; nor can they take credit in their accounts for money paid, as a salary to an assistant Overseer, although such assistant Overseer be appointed with such salary at a vestry meeting.

As Overseers are not compellable, under *stat. 17 Geo. 2. c. 38.* to give in their accounts until fourteen days after *Easter*, the sums of money they may receive in their official capacity, are not due until that time is expired; and therefore, if an Overseer become bankrupt, such money cannot be proved against his estate before his accounts are delivered in.

3. If any action of trespass or other suit shall be brought against any person taking a distress, making of any sale, or any other thing done by authority of the act, they may plead that it was done by virtue of the act; and if a verdict be for the defendant, or the plaintiff be nonsuit after appearance, the defendant shall recover *treble damages* and costs. *Stat. 43 Eliz. c. 2. § 19.*

If any action upon the case, trespass, battery, or false imprisonment, shall be brought against any Overseer, or any in aid of him, for any thing touching and concerning his office, the action shall be laid in the county where the fact was done; and he may plead generally: and, on a verdict in his favour, or if the plaintiff be nonsuit, or suffer any discontinuance, or the fact is not proved to be committed within the county, the defendant shall have double costs. *Stats. 2 Jac. 1. c. 5: 21 Jac. 1. c. 12.*

When any distress shall have been made for a Poor's-rate, the distress itself shall not be deemed unlawful, nor the parties making it deemed trespassers, on account of any defect or want of form in the warrant for the appointment of such Overseers; or in the rate of assessment; or in the warrant of distress thereon; nor shall the party distraining be deemed a trespasser *ab initio*, on account of any subsequent irregularity; but the parties injured may have their action of *trespass*, or on the *case*, at their election; and, if the plaintiff's recover, they shall have full costs; provided no such plaintiff's shall have any action for such irregularity, if tender of amends hath been made before action brought. *Stat. 17 Geo. 2. c. 38. § 8.*

No action shall be brought against any constable or other officer, (and, it has been decided that Overseers are officers within this statute,) or person acting under his authority, for any thing done under a warrant, under the hand and seal of any Justice, until demand made, and left at the usual place of his abode, signed by the party demanding, of a perusal and copy of the warrant, and the same has been refused for six days: and after complying with such demand, if any action be brought, without making the Justice who signed it defendant, on producing and proving the warrant at the trial, the Jury shall find for the defendant, notwithstanding any defect of jurisdiction: and if the action be brought *jointly* against the Justice and the officer, then, on proof of such warrant, the Jury shall find for such officer, notwithstanding such defect of jurisdiction: and if a verdict shall be given against the Justice, the plaintiff shall recover against him the costs which he is liable to pay to the officer acquitted. *Stat. 24 Geo. 2. c. 44. § 6.*—And where in such case the plaintiff shall obtain a verdict against a Justice, and the Judge shall certify, that the injury complained of was wilfully and maliciously committed, he shall have *double costs*. § 7.—But no such action shall be brought, unless commenced within six calendar months after the act committed. § 8.

It has been decided that the *stats. 7 Jac. 1. c. 5: 21 Jac. 1. c. 12.* giving double costs, do not extend to ecclesiastical matters; as, if a Churchwarden present a man upon a pretended crime of incontinency; or a constable present a person as an inhabitant of a parish, when he is only an occupier of lands therein, for non-payment of charges towards the repair of the church: and to entitle an Overseer to the double costs, it must be certified, by the judge who tries the cause, that the Overseer was acting in the execution of his office: if, however, there is a special verdict in a case where an Overseer is defendant; and it appears by the facts found in such verdict, that the act for which the action is brought, was done by virtue or reason of his office, the master must tax double costs, though there is no certificate or allowance by the Judge who tries the cause.

As the law hath provided these protections to Overseers, acting properly in their office, so also it has inflicted punishments on them for misbehaviour; besides those already noticed on their failing to deliver their accounts, and hereafter as to the removal of the Poor.

The Churchwardens and Overseers shall meet together at least once a month, in the church, upon a *Sunday* in the afternoon, after divine service, to consider of business respecting the Poor; upon pain of forfeiting *twenty shillings* for every neglect. *Stat. 43 Eliz. c. 2. § 2.*

The justice, before whom any idle and disorderly person shall be convicted, may order the Overseer to pay *5s.* to the person who apprehended the offender; and, if he shall refuse or neglect so to do, it may be levied by distress. *Stat. 17 Geo. 2. c. 5. § 1.*

If any Overseer (or other officer of any parish) shall neglect, or refuse to obey and perform the several orders and directions in the statute particularized, or any of them, if no penalty is specifically provided, he shall forfeit, not exceeding *5l.* nor less than *20s.* *Stat. 17 Geo. 2. c. 38. § 14.*

If any Overseer, intrusted to make payments for the use of the Poor, shall make such payments in base or counterfeit coin, the offence may be heard in a summary way; and, on conviction, he shall forfeit from *10s.* to *20s.* for each offence. *Stat. 9 Geo. 3. c. 37. § 7.*

Overseers also may be indicted for refusing to accept of and undertake the office, or for refusing to make a rate to reimburse constables for the apprehending of vagrants, under *stat. 17 Geo. 2. c. 1. § 1*; or for refusing to account, within the time limited, for the monies they have received for the relief of the Poor; or for not relieving the Poor; or for relieving them unnecessarily; or for disobeying a legal order of Justices; or for not receiving a pauper when sent to their parish under an order of removal; or for cruelty in the removal of poor women with child: so also the Court will grant an information against an Overseer, for fraudulently contriving to remove a poor person in order to prevent him from becoming chargeable to the Parish; or for contriving to marry a pauper, or for giving a man money to marry a woman who was with child, in order to prevent the child from being a burden to the parish; but the Court will not grant an information against an Overseer, for making an alteration in a Poor's-rate, after it had been allowed by two Justices, if the alteration appear to have been made with the approbation of the Justices. Nor can an Overseer be adjudged guilty of absenting himself from the monthly meetings appointed by *stat. 43 Eliz. c. 2.* until he has had personal notice of his appointment; and if he be appointed, under *stat. 13 & 14 Car. 2. c. 12.* an Overseer in an extra-parochial place, he is not liable to this penalty.

An information, in nature of a *Quo Warranto*, will not lie against Overseers; nor can the Justices in Sessions award an *Attachment* against those officers.

II. 1. THE CHURCHWARDENS and Overseers, or the greater part of them, shall take order, from time to time, with the consent of two Justices, to raise, weekly or otherwise; (by taxation of every inhabitant, parson, vicar, and every other occupier of lands, houses, tithes impropriate, propriations of tithes, coal-mines, or saleable underwood in the parish, in such competent sums as they shall think fit): 1. A sufficient stock of materials to set the Poor on work. 2. Competent sums of money to relieve the lame, impotent, old, blind, and indigent. 3. To put out poor children apprentices. And, 4. For doing and executing all other things concerning the premises, as to the Overseers shall seem convenient. *Stat. 43 Eliz. c. 2. § 1.*—The Mayors, or other Head Officers of Corporations, shall have the same authority within their respective jurisdictions, both in and out of Sessions, as is given to county Justices; and every Alderman of London, within his ward. *§ 8.*

As this latter clause restrains the Magistrates and Justices to the limits of their respective jurisdictions, the Justices for a county cannot allow a rate made by the Overseer of a borough. *2 Const. 62.*

The Justices of the counties, in which separate Overseers shall be appointed for particular townships and villages, shall have the like authority to raise and levy monies, and to do and execute every thing in such townships and villages, as is given them in any parish where the Overseers are appointed, under *stat. 43 Eliz. c. 2. stat. 13 & 14 C. 2. c. 12. § 22.*

The Justices and parish officers of a distinct jurisdiction, as of the precinct of the cathedral church at *Norwich*, may, therefore, be compelled, by a *Mandamus*, to make a rate for the relief of the Poor. *1 Const. 61.*

Public notice in the church shall be given, by the Overseers, of every Poor's-rate allowed by the Justices, the next *Sunday* after such allowance; and no rate shall be valid, to collect and raise the same, unless such notice shall have been given. *Stat. 17 Geo. 2. c. 3. § 1.*

In trespass, on a distress for non-payment of a Poor's-rate, the publication of the rate must be proved; and the court of K. B. will not grant a *Mandamus* to compel Justices to sign a warrant of distress under a Poor's-rate, if it has not been duly published. But a special case, respecting the legality of a rate, is good, though it does not appear therein that that rate was duly published.

The Overseers shall permit the inhabitants of the parish, &c. to inspect every such rate at all seasonable times, paying 1s.; and shall give copies at the rate of 6d. for every twenty-four names; or, on refusal or neglect, forfeit, 20l. *Stat. 17 Geo. 2. c. 3. § 2. 3.*

True copies of all Poor's-rates shall be entered in a book, within fourteen days after the determination of all appeals; to be attested by the Overseers, and kept for public perusal, under penalty of from 5l. to 20s. where no other penalty is provided. *Stat. 17 G. 2. c. 38. § 13, 14.* Overseers, where there are no Churchwardens, may do, perform, and execute, and shall be liable as to all matters relating to the Poor, § 15.

The rate which the Churchwardens and Overseers are, by these statutes, authorised to make, must be assessed only on the visible property, both real and personal, which the occupier or owner may have within the parish; and not according to the amount of the property which a person, rated as an inhabitant, may have out of the parish.

The general rule seems to be, that every species of property, lying within the parish, which has an occupier, and from which an annual profit arises, is rateable to the Poor.

Land; is to be rated according to its value, of which the improved rents may be taken as evidence. Therefore, if a person rent a quantity of land, together with a mineral spring thereout arising, at a gross yearly rent, it is rateable to the Poor in respect of the whole of such rent; for the value of the land is improved by the profits of the spring. But, as the improved rent is supposed to be in proportion to the quantity of stock it keeps or furnishes, the value of the stock ought not to be assessed; unless, indeed, a farmer, under colour of keeping stock for the purposes of husbandry, or as the produce of his farm, do buy and sell articles, such as hay, corn, straw, horses, in the way of trade. So also lands, though given to an hospital, are still rateable to the Poor; for a man cannot, by appropriating his land to charitable purposes, exempt them from taxes to which they were before liable. See *post.*

Tithes; are, in contemplation of law, a tenement, and are holden by the parson as an occupier; and, therefore, the parson is rateable for the amount of his tithes to the Poor; but the assessment must be made personally on him, although he has leased them to one or more of the parishioners. So also, if a sum of money be paid annually in lieu of tithes, it is rateable to the Poor; although the amount of such money be settled under a compromise between the parson and the parish, and confirmed by act of Parliament. But if an act of Parliament say, that the inhabitants of such a place shall pay tithes to the vicar, and give an option to the parishioners, either to pay such tithes

personally, or to raise such a sum as will pay it to the vicar, "clear of all deduction or charges, whether parochial or parliamentary, in lieu of his tithes," this payment is not liable to the Poor's rate. Tithes which are payable by custom only, as on fish, are liable to be rated to the Poor.

Rents; Quit-rents, it has been said, are rateable to the Poor; but this opinion may be doubted; for it is positively laid down in one case, that the quit-rents and casual profits of a manor are not rateable to the Poor's tax; for the property, though permanent, does not produce a regular annual profit, but is merely accidental: but Ground-rents are certainly liable.

Waste lands; By *stat. 17 Geo. 2. c. 37.* waste and barren lands, when improved, and adjudged assessable by the Sessions, shall be assessed to the Poor's-rate of the nearest parish: and the Justices, in General Quarter Sessions, may hear and determine disputes concerning the same. And it has been adjudged, that if a waste be inclosed in the parish of *A.* on which the landholders of the parish of *B.* have right of common appurtenant, the allotment, given in lieu of that right, shall be assessed to the Poor of the parish of *A.*

Tolls; which a corporation is entitled to, and which yield a certain annual profit, are rateable to the Poor. So also, it has been determined, that the grantee of the right of navigation of the river *Ouse*, between *Erith* and *Bedford*, is rateable to the Poor in each of those parishes, in which a sluice is erected; and for the passing of which certain tolls are established, although the grantee live, and tolls are collected in a different parish. So also, where, by a navigation-act, the proprietor was entitled to a toll of 4*s.* per ton, for goods carried up the river *Kennet*, from *Reading* to *Newbury*, or down the river from *Newbury* to *Reading*, and to a proportionable sum for any less distance; and was also enabled to appoint any place of collection; it was held, that the tolls for goods, carried the whole voyage from *Reading* to *Newbury*, were rateable in *Newbury*, though in fact they were collected at *Aldermaston* lock, in the parish of *Padworth*, about midway between *Newbury* and *Reading*, by the agent of the proprietor. So also, where a person is entitled to a dish or measure, by way of toll of all tin gotten in certain lands, he is rateable to the Poor in respect of the profits produced by his right of toll. So also, it has been determined, that the barge way in the hamlet of *Hampton Wick*, purchased by the city of *London*, for the more effectually completing the navigation of the *Thames*, is rateable to the Poor in respect to the tolls and duties thereon collected. But where the right of using a certain path or way is a mere easement; or if *A.* has an exclusive right of using a way-leave over lands which he holds in common with *B.* paying *B.* certain sums yearly; and has the privilege of using another way-leave, occupied by *C.* paying to *C.* so much a ton for the goods carried over it; *A.* is not liable to be rated to the Poor in respect of either of such way-leaves: nor are the tolls collected at a light-house, of all ships passing or coming into the harbour, rateable, unless it be found as a fact, that the person rated is the occupier of the house.

Conventicles; a house converted into a conventicle, if not used for any other purpose than that of public worship, is not rateable to the Poor; nor is the preacher of the sect, unless he be permitted by his congregation to dwell therein, rateable as the occupier thereof: but

if a private building used, and, by covenant, always to be used, as a Chapel, for religious purposes, be let out so as to produce an annual profit, either by the rent of the pews, or by any other means, such a building is then rateable to the Poor.

An alms-house; wholly occupied by objects of the charity, and from which no profits arise, is not rateable to the Poor; and if lands be given to a charitable purpose, as for building a school or alms-house, by a private act of Parliament, in which it is expressed, that such lands shall be free from "all public taxes," they are not liable to be rated to the Poor. But the master of a free school, appointed by the minister and inhabitants, under a charitable trust, whereby a house, garden, &c. were assigned for his habitation, for the teaching of ten poor boys, is rateable for his occupation of the same. 6 *Term Rep.* 332.

Market and fair; the lessee of a stall in a market town, to which the lessee resorts every market-day weekly, to sell his wares, is not liable to be rated to the Poor in respect thereof; nor is a person liable to be assessed for the profits of a fair.

Palaces; A Bishop is liable to be rated to the Poor in respect of his palace; for there can be no prescription against this rate. So also where the scite of a royal palace is demised to a subject, for a certain permanent interest, the grantees that occupy it are rateable for such property to the Poor. So also, though Royal palaces, in the hands of the Crown, are not rateable; yet, if they, or the respective apartments in them, are separately occupied, the occupiers are liable to be rated, whether they pay for such occupation by rent or services.

Army; stables rented by a Colonel of a regiment, by order of the Crown, for the use of the regiment, are not liable to be rated to the Poor. So also, the battery-house, at *Seaford*, which is the property of the Crown, is not liable to be rated, although the master-gunner live in the house; for, being removeable at pleasure, he has no permanent occupation; but if the Session find the fact positively, that he is the occupier, and rate him, such rate is good. But the owner of stables in the parish of *Marybone*, rented by a Colonel of a troop of horse, by the authority of the King, for the use of the troop, is liable to be assessed for them, to the rates collected in that parish, under *stat.* 10 *Geo.* 3. *c.* 23.

Parks; The ranger of a Royal park is rateable, as such, to the Poor; for all the inclosed lands therein, in the parish, yielding certain profits: and so also, is the herbage and pannage of a park, if it yields a certain profit; but if they yield no profit, they are not rateable.

Chambers; in the Inns of Court and Chancery, are not liable to be rated to the Poor.

Hospitals; the officers belonging to and lodging in *Chelsea Hospital* are rateable to the Poor; but neither the trustees nor the servants attending *St. Luke's Hospital*; nor the Governors of *St. Bartholomew's Hospital*, are liable to be rated. See 1 *East's Rep.* 584.

Mines; the lessees of lead mines, who pay no rent, but only a certain part of the ore raised, are not rateable to the Poor: but the lessee of lead-mines, though held of the Crown, is rateable for the profits arising from lot and cope; which are duties paid him by the adventurer without any risk on his part. See also 1 *East's Rep.* 534: 2 *East*, 164: 5 *East*, 478.

Corporation; a corporation is liable to be rated to the Poor, for profits arising from tolls; see *ante*: but a corporation established for the purposes of a public charity, such as the Governors of *St. Bartholomew's Hospital*, are not rateable with respect to the hospital; for they cannot be considered as occupiers. A Corporation, however, seised of lands in fee for its own profit, are inhabitants and occupiers, within the meaning of the *stat. 43 Eliz. c. 2*; and are, in respect thereof, liable to be rated, in their corporate capacity, to the relief of the Poor. So also, lands purchased by a Company, not incorporated, and converted into a dock under an act of Parliament, declaring that the shares of the proprietors shall be considered as personal property, are rateable to the Poor in proportion to the annual profits. See also *5 East's Rep. 453. 480.*

Woods; consisting of timber trees, where the under-wood is left for standards, are not rateable to the Poor.

Offices; an officer of the salt office is not liable to be rated to the Poor in respect of his salary.

Professions; the profit arising from, are not rateable. *7 Term Rep. K. B. 60.*

Machines; the profits of a weighing machine, on a turnpike road, are liable to be rated to the Poor. So, a building called, "The engine-house," in which is a carding machine for manufacturing cotton, is rateable to the Poor, on its increased value by the working of the machine; although this engine is not fixed to the premises, but capable of being moved at pleasure; but the profits of a light-house are not rateable. See *ante, Tolls.*

Prisons; the Warden of the Fleet Prison is liable to the *Poor's*-rates in respect of those profits which he derives from letting lodgings to prisoners, in the prison and the Rules thereof.

Stock in trade; the general question, how far personal property is rateable to the Poor, is not fully determined; and therefore whether stock in trade be liable, must depend, in a great measure, upon the particular circumstances of each case; for although there are not wanting authorities of a recent as well as more early date, to shew that stock in trade, in general, is rateable to the Poor; yet there is no clear and express authority, either of more antient or modern times, in the instance of any one trade, adjudging the stock of that particular trade to be liable, except in those places in which an usage to assess such stock has been proved; though, in many boroughs, the stock in all trades has, immemorially, and even from the very date of the *stat. 43 Eliz. c. 2*, been, in point of fact, rated. It seems, on the whole, to be decided, that stock in trade, if it be the property of the person in possession, and productive is rateable: the circumstance of its having been rated one year, is *prima facie* evidence, that it is productive the next year; and, if not contradicted by other evidence, is sufficient to warrant the justices to decide, that it should be then rated. See *6 Term Rep. 468.*

A farmer shall be taxed for his stock in hand, in case it is more than necessary for the carrying on his farm, and paying his rent; for then it is like a stock in trade; but for stock necessary for his farming, he shall not be taxed. *Vin. Abr. title Poor, xvi. p. 426.* See *ante, Land.*

2. THE POOR's rate must be made by the Overseers, and allowed by the Justices; for the Sessions have no original power to order an

assessment to be made. The Overseers, with the concurrence of the Justices, may make the rate without the consent of the Churchwardens; and when made, the Justices must allow it; for this is merely a ministerial act; and if either the Overseers neglect to make, or the Justices to allow, a rate, they may be compelled by *Mandamus*.

The time for which a Poor's-rate ought to be made, seems to be left to the discretion of the Overseers. The statute of the 43 *Eliz. c. 2*, says, "Weekly or otherwise." In one case, it is said, that it ought to be monthly, because the possessors are to pay, and possessions frequently change; this rule is confirmed by *Burrow*, but denied by *Bott*, who states a *dictum* of Lord *Mansfield*, that a Poor's-rate might as well be made for three months as for one month; and *Holt*, Chief Justice, assigned as a reason against making Poor's-rates quarterly, that by this means a man cannot move in the middle of the quarter, but he must be twice charged. The Legislature, however, has provided against this by *stat. 17 Geo. 2. c. 38. § 12*, which enacts, "That when any person shall come into, or occupy any premises, from which any person assessed shall be removed, or which at the time of making the rate, were empty, every person, so removing or coming in, shall pay the rate, in proportion to their respective occupations."

The purposes also for which a Poor's-rate is made, must be conformable to the direction of the *stat. 43 Eliz. c. 2*; and therefore a rate cannot be made to reimburse former Overseers, for monies expended to the use of the Poor, or to defray law charges; for an Overseer is not bound to lay out the money until he has it: nor can a rate be made to repay money borrowed to build a workhouse: but if the monies, on any rate made by preceding Overseers, be not raised at the expiration of their offices, the successors may, by *stat. 17 Geo. 2. c. 28. § 11*, raise it and reimburse them; and Overseers, before their office expires, may make a rate to reimburse themselves monies laid out in proceedings at law, provided such expence be not incurred wantonly and unnecessarily. And by *stat. 13 & 14 Car. 2. c. 12. § 18*, a rate may be made for reimbursing *Constables* such monies as they shall have expended in relieving the Poor, in conveying them with passes; and in carrying rogues, vagabonds, and sturdy beggars to Houses of Correction.

The rate also must be made in equal proportion, on all the persons assessed, according to their respective properties; and therefore, a pound rate on the rent of lands and houses, and the amount of the interest of personal property, is said to be the most fair and reasonable assessment: but this is denied to be the rule; for the circumstances of a man of landed property may differ in proportion as his family is large or small, and personal property is in a continual state of fluctuation; and therefore, neither rent nor land tax ought to be considered in the making of a rate; but the Overseers, taking their former assessments as their best guide are to proportion rates according to their best discretion; and if they make it unequal, the Sessions, on appeal will correct it; for the Sessions are the ultimate Judges of the proportion and equality of the rate. A Poor's-rate made upon three-fourths of the yearly value of land, and upon one moiety of the yearly value of houses, is not disproportionate or unequal. A rate made on one half of the full yearly value or net rent of farms, and taking one twentieth part of all stock, personal estate, and money out at interest, valuing the interest of such twentieth part at 4 *per cent.* and then rat-

ing one moiety of such twentieth part, varying the proportion as circumstances require, (for the Overseers cannot make a standing rate,) is a good and equal rate. A rate on lands and houses, at one penny in the pound, without making any distinction between farm dwelling-houses and cottages, although they had been before rated in different proportions, is not an unequal rate; for whether houses are to be rated to the Poor, in a different proportion from land, must depend on local circumstances. But of those equalities and proportions, the Sessions are ultimately to judge; and therefore, the Court of King's Bench, presuming *prima facie* that the inferior jurisdiction will not violate its duty, will not grant a *mandamus* to make an equal rate or quash a rate, unless it evidently appear unequal on the face of it.

3. THE appeal to the Sessions may, by 43 *Eliz. c. 2. § 4.* be to any General Quarter Sessions; but by 17 *Geo. 2. c. 38. § 4.* it must be on reasonable notice given to the next Sessions, General or Quarter: see *ante* I. 1, 2: for it is by making the rate that the party is aggrieved, and the publication shall be taken from the time it is allowed; and if an appeal be lodged and dismissed for informality, the party cannot have a second appeal; but if it appears, that reasonable notice has not been given, they may adjourn the appeal to the next Quarter Sessions; and there finally determine the same, and award the party, in whose favour it is determined, costs.

In all Corporations which have not four Justices, persons grieved may appeal against a Poor's-rate to the next Sessions for the county or division. *Stat. 17 Geo. 2. c. 38. § 5.*—The Overseer's book, in which all appeals from Poor's-rate are directed to be entered, shall be produced at the Sessions when any appeal is heard. § 13.

Upon all appeals from rates, the Sessions may, by *stat. 17 G. 2. c. 38.* amend the rate, *without altering it with respect to other persons.* Upon an appeal from the whole rate, if it shall be found necessary, the Sessions may, in their discretion, quash the rate, and direct the Overseers to make a new equal rate. The Sessions cannot strike out the name of a person from the Poor's-rate; so if the name of any person be omitted, the Session must quash the rate, and cannot amend it by inserting his name. But it seems agreed, that where a person is overcharged in a Poor's-rate, the Sessions may relieve him, on appeal, by lessening the sum assessed on him. A parishioner, who is liable to be rated, but who in fact is not rated, is a competent witness to prove that the person, whose name is omitted, is liable to be rated.

The Justices in Sessions shall cause *defects of form* in appeals to be amended without costs; and determine the appeal on the merits of the case. *Stat. 5 Geo. 2. c. 19. § 1.*

By *stat. 41 Geo. 3. (U. K.) c. 23.* For the better collection of the Poor's-rates, it is enacted that on appeal from any Poor-rate the Quarter Sessions may amend it without quashing it; or if necessary to grant relief they may quash it: but the sum assessed shall nevertheless be levied and applied in satisfaction of the next effective rate to be made. § 1.—Notice of appeal shall not prevent distress being made for recovery of the rate, for a sum not exceeding the amount of the last effective rate. § 2.—Quarter Sessions ordering a rate to be quashed may direct any sum charged not to be paid, and stop proceedings for the levying it. § 3.—Notices of appeal shall be in writing, and shall specify the grounds of appeal; and this extends to appeals against Overseer's accounts. § 4. 6.—Appeals may be decide

by consent without notice. § 5.—The rate shall be levied as altered by the Sessions. § 7.—In case in the rate the name of any person shall be struck out, or any sum lowered, the Sessions may order money unduly levied to be repaid with costs. § 8.

4. THE present, as well as the subsequent Overseers may, by warrant from two Justices, levy the sums of money assessed for the Poor's-rates, and all arrears thereof, of every one that shall refuse to contribute according as they shall be assessed, by distress and sale of the offender's goods, rendering the party the overplus; and in defect of such distress, two Justices may commit the defaulter till payment. *Stat. 43 Eliz. c. 2. § 4.*

The goods of any person assessed, and refusing to pay, may be distrained, not only in the place for which the assessment is made, but in any other place within the same county or precinct; and if sufficient distress cannot be found there, on oath before a Justice of any other county or precinct, goods in such other county or precinct may be distrained. *Stat. 17 Geo. 2. c. 38. § 7.*—In case any person refuse to pay the present Overseers, the succeeding Overseers may levy arrears, and reimburse their predecessors. § 11.—But persons succeeding tenants rated, or coming into houses empty at the time of the rate, shall only pay in proportion to the time they have occupied the premises; which proportion shall be settled by two Justices. § 12.

Justices granting distress-warrants shall therein order the goods distrained to be sold within a certain time limited in the said warrant, not less than four nor more than eight days; unless the penalty and charges of distress be sooner paid. *Stat. 27 Geo. 2. c. 20. § 1.*—The officer making such distress may deduct his reasonable charges out of the money arising by the same, and also the penalty or sum distrained for; and shall, if required, shew the warrant of distress, and suffer a copy thereof to be taken by the person whose goods are distrained. § 2.

Justices acting for adjoining counties, and personally resident in one of them, may grant distress-warrants: and the acts of any constable or other officer, in obedience thereto, shall be as valid as if they had been granted by Justices acting for the proper county only; but such warrants must be directed and given, in the first instance, to the constable or other officer of the county to which the same particularly relate; and the constable may take persons apprehended before Justices of the adjoining county. *Stat. 28 Geo. 3. c. 49.* See this Dictionary, title *Justices*.

Justices may act in all matters relating to the Poor Laws, notwithstanding they are rated to or chargeable with taxes or rates, within the parish or place affected by the acts of such Justices. *Stat. 16 Geo. 2. c. 18. § 1.*

A Poor's-rate after it is demanded, and the party summoned, may be distrained for, before the time for which the rate is made is expired; but if the landlord of the premises tender the rate, the Overseers are bound to receive it, although the tenant is not rated; and if they make an excessive distress, they are liable to a special action on the case. The granting of such warrant of distress is a judicial, not ministerial act: and the magistrates ought first to summon the party and hear what he has to say in his defence. 7 *Term Rept. K. B. 207.*

Parishes also may be rated in aid; for, by the said *stat. 43 Eliz. c.*

2, if the Justices perceive that the inhabitants of any parish are not able to levy, among themselves, sufficient sums of money for the purposes of the act, the said two Justices may rate any other (inhabitants) of other parishes, or out of any parish within the hundred, where the said parish is, to pay such sum or sums of money to the Churchwardens and Overseers of the poor parish as the said Justices shall think fit: and if such parish, so rated, is not able to pay the sum assessed, then the Sessions may rate any other (inhabitants) of other parishes, in or out of any parish within the county, for the purposes aforesaid. § 3.

The two Justices, or the Sessions, as the case may happen to be, are under this clause of the act, to order the *quantum* of money, which they think ought to be raised, in aid of the poor parish; but the Overseer must make the rate on those who are to pay it. They may make the order either on particular persons, or on the whole parish, for the relief of a year: but the order must state that it was made by the Justices, if the parish charged be within the hundred; and by the Sessions, if the parish be within the county: but both these jurisdictions are original, and independent of each other; and therefore it is not necessary, that the Justices should adjudge the parish within the hundred incapable, before the Sessions can rate a parish out of the hundred in aid. An extra-parochial place may be taxed in aid of a poor parish, and one vill may be ordered to contribute to the relief of another vill in the same parish, or any division of a county that is equivalent to the name of hundred. It is also said, that the next able parish to the poor parish should be first rated; but one parish in a city cannot be made contributory to another parish in the same city, if not locally situated within a hundred or a county.

An order for taxing one parish in aid of another, under the said act 43 *Eliz.* was held good, although the two parishes were, by act of Parliament, incorporated with others, for maintenance of the poor: there being a special proviso that nothing should extend to repeal the powers of 43 *Eliz.* as to taxing parishes in aid of others. 2 *East's Rep.* 417.

III. 1. THE OVERSEERS are to set to work all such children whose parents shall not be thought able to maintain them; and all such persons, married or unmarried, who have no means to maintain themselves, and use no ordinary and daily trade to get their living by; to relieve (as has been already noticed) the lame, impotent, old, blind, and such other among them, being poor and not able to work; and to put out poor children apprentices. *Stat.* 43 *Eliz. c. 2.* § 1. The Overseers shall meet once a month in the Church on *Sunday* afternoon, after divine service, to take some good course in the premises, on pain of 20s. § 2. [This clause does not extend to Overseers of extra-parochial places. 8 *Mod.* 40.]—The Justices, or any one of them, may send to the House of Correction, or common gaol, such poor persons as shall not employ themselves according to the direction of the Overseers. § 4.—The majority of the Churchwardens and Overseers, by leave of the Lord of the Manor, whereof any waste or common, within the parish shall be parcel, and by order of Sessions may build on such waste or common, at the charge of the parish, convenient houses for the impotent poor. § 5.

The Overseers, with the consent of two Justices, may set up any

trade or manufactory for the employment and relief of the Poor. *Stat. 3 Car. 1. c. 4. § 22.*

The Sessions may set poor *prisoners* on work, and expend the profit arising from their labour, towards their relief; but no parish shall be rated above 6*d.* a week on this account. *Stat. 19 Car. 2. c. 4.* Other provisions are also made by the same statute, for the relief and removal of sick prisoners.

There shall be kept in every parish, at the charge of the parish, a book or books wherein the name of all such persons who do or may receive collection, shall be registered, with the day and year when they were first admitted to have relief, and the occasion which brought them under that necessity. Yearly, in *Easter week*, or as often as it shall be thought convenient, the parishioners of every parish shall meet in vestry, before whom the said book shall be produced; and all persons receiving collections shall be called over, and the reasons of their taking relief examined, and a new list made and entered as shall be thought fit, to receive collection: and no other person shall be allowed to have or receive parish collection, but by authority under the hand of a Justice residing in the parish, or if none be there dwelling, in the parts near or next adjoining, or by order of *Quarter Sessions*, except in cases of pestilential diseases, and then only such families as are infected. *Stat. 3 & 4 W. & M. c. 11. § 11.*

Every person who shall be upon the collection-books, and receive relief, and the wife and children of such person cohabiting in the same house, shall wear a *badge*, as described in the act, on pain of losing the usual allowance; and if any parish-officer shall relieve any person, not having such badge, he shall forfeit 20*s.* *Stat. 8 & 9 W. 3. c. 30. § 2.*

No Justice shall order relief to any poor person, until oath be made before him of some matter which he shall judge a reasonable cause or ground for having such relief, and that the same person had applied to the parish for relief, and was refused: and until such justice has summoned two of the Overseers to shew cause why such relief should not be given. *Stat. 9 Geo. 1. c. 7. § 1.*—The person, whom the Justice shall order to be relieved, shall be entered in the books, as a person entitled to receive collections, as long as the cause of such relief continues, and no longer. § 2.

For the greater ease of parishes in the relief of the Poor, the Churchwardens and Overseers, or the major part of them, with the consent of the major part of the parishioners, may purchase houses, or contract with persons for the maintenance of the Poor; and such persons shall have the benefit of their work and labour; and when any parish shall be too small to purchase or hire such *workhouse*, two or more such parishes, with the consent of the majority of their respective parishioners, may unite in purchasing or hiring such workhouse: and the Churchwardens and Overseers of a parish, where a workhouse is situated, may contract with the Churchwardens and Overseers of any other parish, for the maintenance of any of the Poor of such other parish. But no poor person so removed from one parish to the other, shall gain a settlement thereby. *Stat. 9 Geo. 1. c. 7. § 4.*—By 45 *Geo. 3. c. 54.* no contract for maintaining the Poor shall be valid, unless the contractor resides in the parish where the Poor are to be maintained, and security is given for the due performance of the contract.

The 7th section of 9 *Geo.* 1. c. 4. is repealed, with respect to any parish, township, or place, which shall adopt the provisions continued in *stat.* 22 *Geo.* 3. c. 83. (explained by *stat.* 33 *Geo.* 3. c. 35. for the establishment of *Houses of Industry*, and *Incorporated Societies*, for the maintenance of the Poor. That act lays down many excellent regulations for the furthering the wholesome purpose of protecting and relieving the Poor; by appointing *Guardians of the Poor*, and *Governors* and *Visitors* of the *Poor-houses*; under restrictions which if adopted, would probably remedy many evils now attendant on the Poor Laws. But, it is believed the act is not enforced or attended to, except in a very few parishes, which have reaped the most important benefits from pursuing the plan suggested by the Legislature in that act. The act itself is too long to be here particularized, but may be carried into effect at any time, in any parish, by the consent of two thirds of those rated to the Poor; who must then consult the act, to profit by its directions. See also the additional powers given to the acting *Guardians of the Poor* in the several places where the Acts are put in execution, by 39 & 40 *Geo.* 3. c. 40: 41 *Geo.* 3. c. 9: & 41 *Geo.* 3. c. 12. the latter applying chiefly to times of scarcity. And see *stats.* 42 *Geo.* 3. c. 74: 43 *Geo.* 3. c. 110. for payment of debts incurred, under 22 *Geo.* 3. c. 83. for the building and enlarging of *Poor-houses*, &c.

The *stat.* 9 *Geo.* 1. c. 7. § 4. contained a clause, enacting, that poor persons who refused to be maintained and lodged in such *Work-houses*, should be struck out of the book, and not entitled to any relief from the parish. But by the *stat.* 36 *Geo.* 3. c. 23. after reciting the clause, and that it had been found to be inconvenient and oppressive, "inasmuch as it often prevents an industrious poor person from receiving such occasional relief, as is best suited to their peculiar case: and in certain cases, holds out conditions of relief injurious to the domestic comfort and happiness of the Poor;" it is enacted, that Overseers may, with the approbation of the parishioners, in vestry assembled, or of any Justice of the district, relieve any industrious poor person at their own house, under circumstances of temporary illness or distress, and, in certain other discretionary cases; although such poor person shall refuse to be lodged and maintained in the *Poor-house*. § 1.—And a Justice of the district may, at his discretion, make an order for the relief of such poor persons at their own houses; which the Overseers must obey. But the special cause of such relief must be assigned on the face of the Justice's order; which order is only to remain in force for one month, but is then renewable from month to month; and an oath of the necessity of such relief is to be administered to the poor person applying, and the Overseer is to be summoned to shew cause, if any there be, against it. § 2.

This act does not extend to any places where *Houses of Industry* are provided, under the *stat.* 22 *Geo.* 3. c. 83. already mentioned, or under any special act.

Justices of Peace, and Physicians, Apothecaries, or Clergymen authorized by them, may visit Parish *Work-houses*; and two Justices may make order for relieving the sick Poor therein. *Stat.* 30 *Geo.* 3. c. 49.

The Sessions, as well as the single Justice, may make original orders for the relief of the Poor; for in this respect they have a con-

current jurisdiction. The order must be for the relief of the person in whose favour it is made; and therefore no order can be made to pay a surgeon for attending a pauper, or to pay a bill for the nursing a pauper sick in gaol; nor unless the oath required by *stat. 9 Geo. 1. c. 7.* be first made. The order of relief also must state, that the party is poor and impotent. So also if materials are required to set the Poor on work, one order cannot be made for that purpose, under *stat. 43 Eliz. c. 2.* and *stat. 19 Car. 2. c. 4.* for as they are for distinct purposes, there must be distinct and several orders. An order, however, to pay a person so much "weekly and every week," is good, and the money is due at the beginning of every week. It was also settled, previously to *stat. 36 Geo. 3. c. 23.* that when an order of relief is made to a poor person, such person only, and not any other of his family, is obliged to go into the Work-house: and when a bastard child is born in a parish, and the parents neglect to provide necessaries for its sustenance, the parish officer must afford it relief, although there is no order of Justices for the purpose.

Militia men and their substitutes are relieved according to the provisions of the several militia acts, and other acts of Parliament, *viz. stats. 19 Geo. 3. c. 72: 33 G. 3. c. 8. § 1: 34 Geo. 3. c. 47:* and particularly *stat. 35 Geo. 3. c. 81.*

2. The father and grandfather, and the mother and grandmother, and the children, of every poor, old, blind, lame, and impotent person, or other person, not able to work, being of sufficient ability, shall, at their own charges, relieve and maintain every such poor person, at the rate the Justices in Sessions shall assess, on pain of 20s. a month. *Stat. 43 Eliz. c. 2. § 7.*—The penalties levied, for disobeying such order of maintenance, shall go to the relief of the Poor. § 11.

The Justices of the county or place in which the rich relation, and not where the poor relation, dwells, have alone authority to make this order, and to assess the rate of maintenance. The order must be made at a Quarter and not at a General Session; in which it must be alleged, that the person to be relieved is poor, unable to work, and liable to become chargeable to the parish; and the person to relieve is of sufficient ability and within the jurisdiction of the Session. The Session have, in this case, an original jurisdiction; but they make it as well upon the complaint of the Overseers, as upon the complaint of the poor relation; but they must order a sum of money to be paid; for they cannot order generally the rich person to relieve his poor relation.

This statute extends only to natural relations, and not to relations in law; and it seems that, in default of one relation, another may be compelled to relieve the pauper; as in the case of grandfather, father, and child; the father being incapable of maintaining the child, the grandfather may be compelled, if of sufficient ability; and therefore a man is not obliged to maintain his son's wife, nor his wife's mother, nor his wife's child by a former husband. And it seems to be now settled, that it makes no difference, whether the wife be alive or dead at the time her poor relations require relief, contrary to some former determinations on this subject. It is said also, that a wife cannot be ordered to maintain her grandchild, nor the husband of a grandmother to maintain her grandchild; but if an order of maintenance be made on a grandmother, and she afterwards marries, the husband

shall be liable (during her life) to the maintenance. It is also clear, that the reputed grandfather of a poor orphan cannot be ordered to maintain it, for no order can, in this respect, be made for the maintenance of a bastard. See title *Bastard*.—But where this species of order is well and properly made, the party may be indicted for disobeying it; and the money ordered to be paid becomes due at the *beginning* of each week.

By *stat. 11 & 12 W. 3. c. 4.* the Protestant children of Popish parents may obtain relief by application to the Court of Chancery; and by *stat. 1 Ann. c. 30.* the same is enacted with respect to the Protestant children of Jews.

As to relieving *Deserted Families*—Persons running away from their families, and leaving them on the parish, are declared to be *incorrigible rogues*; and if either man or woman shall *threaten* to run away, and leave their families on the parish, the same being proved by two witnesses, on oath before two Justices, they shall be sent to the House of Correction, unless they give security to the parish. *Stat. 7 Jac. 1. c. 4. § 8.*

The Churchwardens and Overseers, where any wife, child, or children, shall be so left, on application to, and by warrant of, or order from, two Justices, shall seize so much of the goods and chattels, and receive so much of the rents and profits of the lands and tenements of the husband, father or mother, as the two Justices shall direct, for and towards the discharge of the parish, and relief of the family; and, on the order being confirmed at Sessions, the goods may be disposed of, and the rents received, as the Court shall direct. *Stat. 5 Geo. 1. c. 8.*

All persons who *threaten* to run away and leave their wives or children to the parish, are declared *idle and disorderly persons*; by *stat. 17 Geo. 2. c. 5. § 1.*—And all persons, who *run away* and leave their wives or children so chargeable, are declared *rogues and vagabonds. § 2.*

See further, title *Vagrants*; and the Militia and Mutiny Acts.

IV. THE state of the Poor, in antient times, has been slightly mentioned at the beginning of this long article: at present, there are *ten* modes whereby persons may gain *A Settlement*: which entitles them to claim and receive relief from the parish in which they are settled, whenever such relief is necessary; and if this happens while the pauper resides in a parish, where he or she is not settled, they are to be removed to their place of settlement; under the regulations noticed in this and the two subsequent divisions.

1. The place of *Birth* is the place of settlement of all illegitimate children; for a bastard, not having any legal parents, cannot be referred to their settlements, as a legitimate child may be: but this general rule is subject to the following exceptions: 1st. Where the mother is conveyed collusively and by fraud into the parish where the bastard is born.—2dly. Where a bastard is born in a house of industry, hospital, county gaol, or house of correction. See *stats. 13 Geo. 3. c. 82: 20 Geo. 3. c. 36:* and see *stat. 13 Geo. 2. c. 29,* as to the *Foundling Hospital*.—3dly. Where born while the mother is under an illegal order of removal.—4thly. Where born pending an appeal against an order of removal, which is afterwards reversed.—5thly. Where born, *in transitu*, while the mother is passing under an order of re-

removal; or remaining under the suspension of such order. See *post* VI. But a bastard, born on the road, while the mother is endeavoring to reach her own parish, without fraud, is settled where born.—6thly. Where born after an order of removal is made out, but before actual removal.—7thly. Where the mother returns to the place from which she was removed.—8thly. Where born in the streets while the mother is wandering in a state of vagrancy. *Stat. 17 Geo. 2. c. 5. § 25.*—In all other cases the birth decides the settlement.

This rule also, that a bastard is settled where born, extends to the illegitimate offspring of persons certificated; see *post* V.; although the certificate is in force at the time of the birth, and undertakes to provide for the mother and her child; but not if it expressly undertake to provide for the child she is then pregnant with; for then the child, though born a bastard, shall be settled in the certifying parish; and where a child is born a bastard, and its parents afterwards intermarry, and the father procures a certificate for himself, his wife, and *his* child, such bastard shall have his father's settlement. Under *stat. 8 & 9 W. 3. c. 30.* (see *post* V.) the *legitimate* children of certificated persons shall not gain a settlement by birth in the certificated parish.

The parish where born is also *prima facie* the settlement of all legitimate children; but this, though the primary place of settlement, is only so until the settlement, to which such child is entitled by parentage, can be discovered. So also, the place, where a legitimate child is first *found*, is the place of its legal settlement, until the place of its birth, or its derivative settlement, can be known.

2. ALL legitimate children are settled in the parish, in which their father is last settled, wherever else he may have resided, or they may have been born: or if the father have no settlement, or if that cannot be traced, then in the place in which their mother is settled; until they are emancipated, or gain a new and distinct settlement for themselves. Foreigners, who have gained no settlement in *England*, cannot, of course, communicate this species of settlement to their children; and if the children are not born here, they cannot resort to that primary settlement which is gained by birth; but they (and their parents, if necessary) must be maintained where found. The father's settlement is communicated to his legitimate child, though born after his death, or though it is an idiot; and this right, which children have to the father's settlement, is not taken away after his death, by their mother gaining a new settlement, in her own right, by marriage; nor can she, during the life of her husband, gain a different settlement, for her children, than that which they inherit from their father: but if a child above the age of nineteen, who possesses a derivative settlement from its father, go, after his death, with its mother into a different parish, and live there with her upon her own estate, they, both of them, gain a new settlement by their residence. See *post* 10.

But children, after the age of seven years, (or perhaps before,) may become emancipated, and gain a settlement for themselves. Thus, where a child, on the removal of his father into another parish, was left behind, and continued distinct from his father's family, maintaining himself by his own industry, he was held to be emancipated. So also, where a son, nineteen years of age, left his father's family, and went into another parish, where he married and had children. So also, where a son, after he was one-and-twenty years of

age, married and lived with his wife and family, separately, and distinct from his father's family, though in the same parish, he was held to be emancipated: but a child cannot be emancipated from its parents, either by marriage or living apart in a distinct habitation, unless such child has gained a settlement in its own right. A Son, therefore, who, at fifteen years of age, bound himself apprentice, served out part of his time, and worked about the country in the way of his business; but went to his father's house, whenever it was convenient, was held not to be emancipated. So also, where a son resided nine or ten years, by his father's direction, at the house of a friend, by whom he was supported, this was held not an emancipation. So also, where a boy was hired out for seven years successively, but his father received the wages, and maintained him. So, where a child was separated from its family by being maintained several years in a workhouse; or where a child leaves its father's family when only five years old, and lives with different relations, till ten; or where a son, sixteen years of age, was bound apprentice for five years, and afterwards returned to his father's family, the indentures being void for want of a stamp: or where the son of a certificated person, at nineteen years of age, leaves his father's family, and serves a year under a hiring in an extra-parochial place, and then returns unmarried, and under age, to his father's family: for in all these cases, the child, not being of age, nor having married, nor gained a settlement in his own right, nor contracted any relationship inconsistent with the idea of being of part of his father's family, cannot be considered as emancipated, so as to lose the benefit of any settlement which his father may gain. It has, however, been held, that if a son enlist himself as a soldier, he thereby emancipates himself from his father's family; and cannot, therefore, change his original derivative settlement, by parentage, for a new settlement gained by his father.

So a son of age, and married, continuing to live with his father, does not follow such new settlement gained by the father, though he accompanies him as part of his household. 1 *East's Rep.* 526. But see 8 *Term Rep.* K. B. 479.

3. SETTLEMENT by *Marriage* is acquired by construction of Law, independently of any statute; and, therefore, the moment a legal settlement takes place, the settlement of the husband is *ipso facto* transferred to the wife. It must, however, be a legal marriage, conformable to the direction of the Marriage-Act, *stat.* 26 *Geo.* 2. c. 33; and therefore, where a woman under age was married without the consent of parents, it was held, that the children born under such a connection, were illegitimate, and, as such, could not gain a derivative settlement from their parents. So also, where a marriage was celebrated in a chapel, in which banns had not been usually published, according to the direction of the Marriage-Act, it was held, previous to the *stat.* 21 *Geo.* 3. c. 53, (See title *Marriage*.) that the wife gained no settlement by virtue of this union; and it is necessary that the marriage should be with all the legal forms, though both the parties are illegitimate (see title *Marriage*): but a marriage in *Scotland* is a legal marriage, for the purposes of gaining a settlement. So also, is a marriage, though procured by a third person by fraud; and a cohabitation, as man and wife, for 30 years, is such a presumptive proof of marriage as will entitle the children of the parties to the settlement of their parents; nor is the validity of marriage, as to the pur-

poses of settlement, affected by the entry, in the parish register, not being signed by the minister, or some other person in his presence, as directed by *stat. 26 Geo. 2. c. 33*. Indeed, the Law, favouring settlements as much as possible, has, in many instances, precluded the fact of marriage from being controverted: thus after an order of removal, stating the parties to be husband and wife, the fact of marriage can only be controverted upon appeal to the Sessions. So also, if a man and woman be certificated as husband and wife, the legality of their marriage cannot be controverted by the certifying parish: and it is not necessary for this purpose to prove a marriage in fact; evidence of cohabitation, reputation, and other circumstantial proof, is sufficient.

But although the husband's settlement is, if known, communicated to the wife, and retained after the husband's death, till she gain a new one, notwithstanding she never lived with him at the place in which he is settled; yet her own settlement, in certain cases, is not extinguished, but only suspended, during the coverture; and if her husband have no settlement, her own remains even during the coverture; or if he have a settlement, but it cannot be discovered, her settlement returns. The removal of a wife, therefore, imports, that it is to her husband's settlement; for it is incumbent on the parish, to which she is removed, to prove a different settlement, even though she be not removed as a wife.

4. To prevent improper persons from gaining a settlement by *Residence*, it was enacted, by *stat. 13 & 14 Car. 2. c. 12. § 1*, "That it shall be lawful, upon complaint made by the Churchwardens and Overseers of the Poor of any parish, to any Justice of the Peace, *within 40 days* after any poor person shall come to settle in any tene-ment, under the yearly value of 10*l.* for any two justices of the Peace, of the division where any person likely to be chargeable to the parish shall come to inhabit, by their warrant to remove and convey such person to such parish, where he or she were last legally settled, either as a native, householder, sojourner, apprentice, or servant, for the space of forty days at the least, unless he or she give sufficient security for the discharge of the said parish, to be allowed by the said Justices."

By *stat. 1 Jac. 2. c. 17. § 3*, "the 40 days' continuance, intended by *stat. 13 & 14 Car. 2. c. 12*, to make a settlement, was to be accounted from the time of his or her delivery of notice, in writing, of the house of his or her abode, and the number of his or her family, to one of the Churchwardens or Overseers of the Poor of the parish to which they shall so remove."

By *stat. 3 & 4 W. & M. c. 11*, "the 40 days were to be accounted from the publication of the notice, in writing; which the Churchwardens or Overseers were required to cause to be read publicly, immediately after divine service, in the church or chapel of the said parish or town, on the next Lord's Day, when there should be divine service in the same; which notice was to be registered and kept in the book of the Poor's accounts; and, if they neglected to read or register such notice, they were to forfeit 40*s.* No soldier, seaman, shipwright, &c. were to gain any settlement in any parish, by delivery and publication of such notice, unless after the dismissal of such person from the service. § 4.

By the same statute it is provided, that if any person shall execute

an annual office, or being properly rated, shall pay the public taxes; or shall be lawfully hired as a servant, and serve for a year; or shall be bound an apprentice in any parish; they shall respectively gain settlements thereby: though no such notice, in writing, was delivered or published, as the statutes, above recited, require. §§ 6, 7, 8.

It is apparent, from these statutes, that the Legislature was anxious to prevent a settlement being gained by constructive notices; it was therefore settled by various determinations of the Courts, that nothing could be equivalent to notice, except those acts for which the statutes provide; and now, by *stat. 35 Geo. 3. c. 101. § 3*, it is expressly provided, "that no person shall, in future, be enabled to gain any settlement in any parish, township, or place into which they shall come, by delivery and publication of any notice in writing."

The 40 days' residence, which is required to gain this species of settlement, need not be in the tenement which the party occupies; and therefore, when a person took a windmill of above 10*l.* a year, but resided in a distant cottage under 10*l.* a year, within the same parish, he thereby gained a settlement; nor need the residence be for forty days successively; but if, during his occupation of the tenement, he resided at different times any where within the parish for more than 40 days, it is sufficient; and if he occupy two tenements, in different parishes, and reside alternately in each parish above 40 days in the whole, his settlement shall be in that parish in which he lodged the last night of the first 40 days; but the occupation must be legal; for if he has obtained possession of the tenement by fraud, a residence will not gain a settlement; and it is a general rule, seemingly without a single exception, that no person can be removed from residing upon his own estate, whatever likelihood there may be of his, or any part of his family, becoming chargeable. See *post* 10. It is also expressly enacted, by *stat. 13 Geo. 3. c. 84*, that gate-keepers, on turnpike roads, shall not be removed from their respective toll-houses: and, by other statutes, that officers, mariners, soldiers, marines, (and militia-men, being married,) shall not be removed from those parishes, in which they set up and exercise any trade, until they become actually chargeable. See *post* VI.

5. By the construction of *stat. 13 & 14 Car. 2. c. 12. § 1*, noticed in the preceding division, it is *implied*, that whoever shall *rent* a tenement above the yearly value of 10*l.* in the parish, in which he shall come to inhabit, for the space 40 days, shall thereby gain a settlement.

But by *stat. 9 & 10 W. 3. c. 30. § 11*, it is moved, that no certificate person (see *post* V.) shall be adjudged to gain a settlement by residence, unless he shall really and *bonâ fide* take a lease of a tenement, of the value of 10*l.*

In the construction of this part of the statute, 9 & 10 *W. 3. c. 30*, it has been held, that where a certificate-man agreed with the lessee of a mill, that he would occupy the mill; and, in pursuance of the agreement, occupied it for two years, this was a sufficient *taking*, to avoid the certificate though there was no under-lease or assignment; for the rent being reserved for a year, it is an absolute demise for a year: and if not, it is a lease at will, which is sufficient. And where it was stated, that a certificate-man took a lease for seven years, the Court said, they would intend that it was by deed, for otherwise it would be no lease at all.—And it is not material, though the greatest part of the premises lies in a different parish, if the tenant reside on

that part which is in the certificated parish.—And renting a tenement of 10*l.* a year, with a residence of 40 days, will avoid a certificate, although the certificate be granted, *after* the taking, and before the expiration of the 40 days.

As to the *kind* of Tenement; It has been held, that the renting of a water-mill, a coney warren, a piece of pasture ground, a house within the rules of the Fleet-prison, a wind-mill, a dairy of cows with privilege of pasture for them, a potatoe ground, a first and second floor unfurnished, a shop occupied separately from the house to which it belongs, a furnished room hired for a particular purpose though the landlord is to find fire and have the use of it at other times, a land-sale colliery, a cattlegate, the fishery of a pond with the spearsedge flags and rushes in and about the same, the hay grass and aftermeath of meadow land, a rabbit warren though the party has no interest in the soil, except that of entering on the soil to kill the rabbits, the fogs and after-grass of meadow land, the hiring of twenty cows at 3*l.* 10*s.* *per annum* each with privilege to feed them in particular fields for a certain part of the year during which time no other cattle were to depasture there; are all of them *Tenements* within the meaning of the statutes: and will, if above the value of 10*l.* a year, gain the party, who resides on them for 40 days, a settlement in the parish in which each respectively lies. But no gate-keeper, or person renting the tolls of turnpikes, and residing in any toll-house, belonging to the trustees, shall *thereby* gain a settlement. *Stat. 13 Geo. 3. c. 84. § 56.* But such person may gain a settlement by renting a tenement above 10*l.* a year, in the parish where he resides, in such toll-house. 5 *East's Rep.* 333.

The tenement must be *entire*; but it is not necessary to this purpose that the tenement should be taken all of the same landlord, or that it should lie entirely in the same parish. Therefore a house rented at 5*l.* a year of one landlord, and a piece of land of 6*l.* a year of another landlord; or a house of 6*l.* a year rented of one man, and stables of 50*s.* a quarter of another; are tenements sufficiently entire to give a settlement. So also, an entire tenement of house and lands of the value of 12*l.* a year, lying in different parishes, although in neither parish the value amounts to 10*l.* a year, will gain a settlement; and so, though the taking be at different times, and the tenement is afterwards underlet in part, or in the whole, to, and occupied jointly with, another person; and, in these cases, the settlement will be in that parish in which the tenant lodges the last 40 days.

The tenement also must be of the *value* of 10*l.* a year; and the value does not depend upon the rent, but on the real worth it may be of at any one time during the occupation of the tenant; for though no rent be reserved, yet if it be worth 10*l.* a year, it will gain a settlement. The rent, however, is good *prima facie* evidence of its value, and shall be conclusive, if no other evidence of value appear. It hath accordingly been adjudged, that a house of the value only of 6*l.* 10*s.* a year, taken at the rent of 10*l.* a year, under a covenant that the landlord shall make new buildings, is not of sufficient value, if those new buildings are never made. So, a sole tenancy in a house of 8*l.* a year, and a joint-tenancy in land of 3*l.* 15*s.* a year, hath been adjudged not of sufficient value. So also, a house of 16*l.* a year, occupied jointly by two persons, or a farm of 14*l.* a year, rented by two persons, jointly, although the rent be paid, the stock stinted, and the

profits taken separately by each, is not of sufficient value to gain either of them a settlement; but a farm of 52*l.* a year rented, occupied, and managed jointly by two tenants, is a tenement of sufficient value to each of them. A tenement of 10*l.* a year, taken without fraud, will gain a settlement, although the tenant live only in one part of it, and underlet the remainder to different tenants; and therefore, where a man took a tenement, consisting of a cottage and an acre of land of the value of 7*l.* a year, and let the whole of it at the same rent to another person, and afterwards took another tenement of 3*l.* a year, these two takings were held sufficient to gain a settlement; for he continued tenant of the cottage and the land, though they were underlet. A cottage of 6*l.* 17*s.* a year, held for the remainder of 99 years, on a lease determinable on the life of the tenant, is a tenement of the value of 10*l.* a year. So also, where a person was appointed to be Herd to several persons, who had a right of common upon a large extensive common or waste, and resided in a house situated on the common, and was allowed, as a reward for his fidelity and service, the exclusive enjoyment of the house and parcel of meadow adjoining thereto, of the value of 20*l.* a year; this was held to be a sufficient renting, and of sufficient value to gain a settlement: but if the renting be fraudulent, as taking a farm without being able to stock it, it will not gain a settlement, although its value is more than 10*l.* a year.

As to the *time* of renting; the tenement need not be taken for a whole year, and therefore a taking and occupying from the first of *June* to the *Lady Day* following, has been held sufficient to gain a settlement.

To complete this species of settlement, there must be a *Residence* of 40 days; either on the tenement, or in the parish where it lies; for a residence in one parish, and occupying a tenement in another, is not sufficient.

6. IF any person shall come into any town or parish to inhabit, and shall, for himself, and on his own account, be charged with, and pay, his share towards the *public Taxes*, or levies, of the said town or parish, he shall be adjudged and deemed to have a legal settlement in the same. *Stat. 3 & 4 W. & M. c. 11. § 6.*—But no person shall gain such settlement by paying taxes for any tenement of less than 10*l.* yearly value. *Stat. 35 Geo. 3. c. 101. § 4.*

As to the *kind* of taxes; the Land-tax and the Poor's-tax are public taxes within the meaning of this statute; but a tax, assessed for the repair of a county bridge; or towards the repairs of the highways; or for the scavenger, *stat. 9 Geo. 1. c. 7. § 6*; or the duties on houses and windows, *stat. 21 Geo. 2. c. 10. § 13*; or the stoppage raised on the persons belonging to *Sheerness* yard, for the relief of the poor; are neither public taxes, or levies, within the meaning of the Legislature; and therefore, the paying them will not entitle the person to a settlement under this statute.

The party must be both assessed to and pay the tax to gain a settlement; and payment of an assessment, which, as to other purposes, is illegal and void, will gain a settlement: so also, if it be made upon the house, and not upon the person, or on the occupier of such a house, or the farmer of such lands; and if the assessment continue in the rate book in the name of a former tenant deceased, payment by the occupier is sufficient; for it is not necessary that the tenant should be

rated by *name*; if he is *virtually* rated and paid, it is sufficient. If the tenant be assessed and he pay, he will thereby gain a settlement, although it is repaid to him by his landlord, or allowed in his rent; but if the landlord be assessed, payment by the tenant is not sufficient, although the tax is demanded of him by the officer who made the rate. So also, where a father occupied a house, and was rated to the Poor, but gave up the occupation to his son with whom he continued to live merely as an inmate; a payment by the son, under this rating, will not gain him a settlement; but if the father had continued in the occupation, and the son being the visible manager of his concerns, had been rated instead of his father, and had paid, he would have gained a settlement.

The rate books are generally divided into different columns, and distinguished—"Landlords rated,"—"Names of occupiers;"—and therefore, if different persons be named in each, payment by the one will not gain a settlement; because in the one case he is not rated, and in the other has not paid; as where the landlord is assessed, and tenant pays; but in general where there is no name mentioned, or if both the names of landlord and tenant are inserted, but it does not appear which of them is rated; or if the tenant's name has been once introduced upon the rate book, though taken off in consequence of his poverty, and at his own request, and no other name inserted; it shall be considered, in all these cases, as an assessment upon the tenant; for the land tax is the tenant's tax, as between him and the public, and shall be so taken, unless it expressly appear, that the landlord is rated; but whether landlord or tenant be rated, is a question of fact for the Justices at Session to decide.

A landlord cannot pay the tax for the tenant; and therefore where a farm was rated by a particular name, and neither the name of the landlord or tenant on the rate, and the landlord paid the tax and received it again from the tenant, it was held that this did not give the tenant a settlement: but if a tenant be rated and abscond, and his landlord desire the Collectors to levy it by distress, lest he should lose the money; and on their going to the premises, a friend of the tenant's pays it to him; this is equal to payment by the tenant himself, and he thereby gains a settlement. So also, if the Collectors of the Land-tax demand payment of the tenant, and on his refusing to pay, they shew him a paper-writing and read it, and tell him the sum he is to pay, and on his refusal levy the money by distress, and he afterwards pays such sum as an assessment on him, it shall be intended that he was in fact assessed, unless the contrary clearly appear.

7. If any person, who shall come to inhabit in any town or parish, shall for himself, and on his own account, execute any *public annual Office*, or charge, in the said town or parish, *during one whole year*, he shall have a legal settlement in the same. *Stat. 3 & 4 W. & M. c. 11. § 6.*

If a certificate person shall serve an annual office in such parish, being legally placed in such office, he shall thereby gain a settlement. *Stat. 9 & 10 W. 3. c. 11.*

The *kind of office*; the office need not to be what is generally called a parish office, for if it be an annual office, and served in the parish, it is sufficient; and therefore, it has been held, that serving the office of *warden of a borough*; or the office of *parish clerk*, though chosen by the parson, and not by the parishioners, and although he has no licence from the Ordinary, for the office is annual; or the of-

fice of *collector of the land-tax*; or the office of collector of the *duties on births and burials*; or the office of *tithingman*; or the office of *constable of a city*, although the election is not in the parishioners; or the office of *petty constable*, if sworn in at the leet, though served by deputy; or the office of *bailiff* or ale-conner; or the office of *sexton*; or the office of *hog-ringer*, being annual offices, will gain a settlement:—but the office of *deputy constable*; or the office of *school-master* to a charity school, established by private donation; or the office of *deputy tithingman*; or the office of *curate*; are *not* annual offices, and therefore the serving them will *not* gain a settlement.

The party also must be regularly and legally *appointed* to the office; or the serving it will not be sufficient; and therefore, although an inhabitant of a parish has a tally left at his house, signifying that he is chosen *borsholder* or *tithingman*, yet if he is not presented and admitted in the Court leet, he is not legally placed in the office, and cannot gain a settlement by serving it. So also, where a man was chosen *constable*, and even sworn in, yet not being presented at the leet, it was held that he gained no settlement by serving the office: but when a person was appointed a *tithingman* by the steward of the leet, and served the office for a whole year, it was held, that he thereby gained a settlement, although he was not sworn in until after the year was expired.

The office must be completely *served* for a year; and therefore, if the party become chargeable before the year expires, this is an interruption to the service, and will prevent his gaining a settlement, although no other person is appointed in his stead, until the year expires: and so strictly has this part of the statute been construed, that when a *tithingman* served two half years at different times, it was held, that they could not be joined so as to make a service for a year, although there was a custom in the parish not to serve the office longer than half a year at a time; for the very custom proved that in this parish the office of *tithingman* was not an annual office. If, however, two parishes use the same church, and the sexton live in that parish, in which neither the church nor the burial part of the churchyard lies; yet, by serving this office, he shall gain a settlement in that parish where he resides.

8. THE class of *Settlements, by Hiring and Service*, is, perhaps, above all others, obscured by an innumerable variety of cases; the determinations in which, unless very minutely attended to, will frequently appear contradictory. The following summary is intended to contain a statement, of the general rules on this head, as concise as possible; without entering into exceptions, caused, for the most part, rather by the particular circumstances of the cases, than by any uncertainty in the Law.

If any unmarried person, not having child or children, shall be lawfully hired into any parish or town, for one year, such service shall be adjudged and deemed a good settlement therein. *Stat. 3 & 4 W. & M. c. 11. § 6.* But no person, so hired as aforesaid, shall be deemed to have a good settlement in any such parish or township, unless such person shall continue and abide in the same service during the space of one whole year. *Stat. 8 & 9 W. 3. c. 30. § 4.*

Under *stat. 9 & 10 W. 3. c. 11*, Certificated persons cannot gain a settlement by hiring and service: And by *stat. 12 Ann. st. 1. c. 18. § 2*, it is expressly provided, that no hired servant to a certificated person shall gain a settlement, by such hiring and service.

No child, nurse, or servant, received into, maintained, or employed with the *Foundling Hospital*, shall gain any settlement in the parish where such hospital is situated, by virtue of being so received, employed, or maintained. *Stat. 13 Geo. 2. c. 29. § 7.*

No person, who shall be admitted into the *Magdalen Hospital* as a penitent prostitute, or who shall be employed in the said hospital as a hired servant, shall, by reason of such admittance, or service, gain a settlement in the parish in which the said hospital is or shall be situated. *Stat. 9 G. 3. c. 31. § 8.*

Who shall gain such settlement:—The clause in the *stat. 3 & 4 W. & M. c. 11*, which prevents married persons, having children, from gaining settlements by hiring and service, was made merely for the protection of parishes; and therefore, a widower, although he has children, if such children are emancipated, and have gained settlements, for themselves, may gain a settlement by hiring and service; for, in such case, there is no danger of the parish being burdened with the children, by settlement derivatively from their father; and, upon this principle, it has been settled, that a daughter, who is emancipated, may gain a new settlement, by hiring and service with her father. And, indeed, this clause has always been considered as favorably as possible to settlements; and therefore, if a wife, where the husband is abroad, is hired as a servant, and before the year expires, her husband dies, a continued service for a year, from the time of his death, will gain a settlement, although, at the time of the hiring, she was a married person. So also, if a servant be unmarried at the time when he is *hired*, he gains a settlement by a year's service, although he marry before the service commences: So also, if a married man hire himself conditionally, and, before the condition performed, his wife dies without issue, he is an unmarried person within the statute; and shall gain a settlement, if the hiring takes place, and he serves a year from the time the condition was performed.

To complete this species of settlement, there must be such a *Contract*, between the master and servant, as will amount to what the Law considers as a hiring; for a hiring cannot be intended, where no contract appears: and therefore, where a gentleman, wishing to have his foot-boy instructed in the art of shaving, sent him to a barber to learn to shave, where he staid three years, and afterwards became chargeable to the parish: the Court held, that there was not such a contract in this case as would amount to a hiring and service; for there was no implied agreement, much less a positive contract, between the boy and the barber: so also, where a Captain brought a female negro slave from *America* to *England*, who lived with him here in the capacity of a servant, but there was no hiring; it was held, that the service, under this circumstance, would not entitle her to a settlement, because there was no contract appeared: so also, where a boy worked for several years with his uncle, who allowed him board, lodging, clothes, and pocket money; yet, because there was no contract between them for a hiring, it was held, that the boy did not gain any settlement under this service: so also, where the waiter of an inn being ill, procured another waiter of his acquaintance to assist him, who continued, with the knowledge of the master of the inn, boarding and lodging in the inn for the course of nineteen months, when the waiter went away, and the assistant continued to serve for more than twelve months afterwards, as he had done before, without

making any agreement with the master; it was held, he did not gain any settlement by this service; because there was no contract for such service with the master.

And when a contract of hiring does appear, or can, from the circumstances, be inferred; yet it must also appear that the hiring was for a year. If, however, there be a hiring in general terms without any designation of time, it is always understood that such general hiring is for a year. Therefore, where a boy went into a service without any express contract being made, and his master told him, that if he staid a year, and behaved himself well, he would give him, the next year, a livery and full wages; the Court held, that although there were no express hiring, yet, as it was clearly a general hiring, it amounted, by construction of Law, to a hiring for a year; for a general hiring shall always be construed into a hiring for a year: of which, it would be needless here to multiply examples.

But a hiring at weekly wages, for so long time as the master should want a servant, is not a hiring for a year; for the contract is at the will of the master, and is so far from being for a year, that the servant may be turned away at the end of the week. And the same principle seems to apply to all cases where, by the express contract, the hiring may be determined either by the master or the servant before the year expired: and to make a hiring such as will gain a settlement, there must be, in the original agreement, something by which it appears to be a hiring for a year; as that the party should have so much a week the year round, or so much a week both summer and winter.

A hiring at eight shillings a month, with liberty to let himself out in harvest time, and depart at a month's wages, or a month's warning, is not a hiring for a year: and the distinction in this species of hiring seems to be, that where the liberty either to work for another master, or not to work for the master hiring, forms part of the contract, that such hiring is not a hiring for a year, and, of course, a service under it will not gain a settlement; for, to gain a settlement, the servant must continue and abide in a state of servitude, all the time, during a whole year. But where the exception does not form any part of the original agreement or contract, then an exemption from service, during part of the year, particularly if it arise from usage, will not vitiate the hiring. And even where the hiring is accompanied with an agreement to be absent; yet if it be for the purpose of a duty, which the Law would have compelled the master to permit the servant to perform, it will not vitiate the contract; as where a man was hired to serve a year, with an express exception to be absent for a month on the duty of a militia-man. In all cases, if the contract be legal at the time of the hiring, a new agreement, during the service, will not avoid a settlement under it; as where a man hired himself to a turner for a year for board, lodging, pocket money, and clothes, but in the middle of the year it was agreed, that instead of these, he should work by the piece, and have what he could earn.

*As to customary and retrospective Hirings:—*A hiring from May-day to Lady-day, and from Lady-day to May-day; or from the 3d of October to the Michaelmas following; or from Michaelmas to Michaelmas, with liberty of absence during sheep-shearing or harvest month, will not gain a settlement; although in all these cases it is the custom of the country to consider such hiring as a hiring for a year; but

a hiring from *Whitsuntide* to *Whitsuntide*, if it be the custom of the country to consider such hiring as a hiring for a year, will gain a settlement, although it fall short of 365 days: So also, a hiring at a statute fair, held the day after *Michaelmas-day*, from that time till the *Michaelmas* following; or from the second day of one year until the first day of the next year, are hirings for one year; for the days shall be taken inclusively: But where such a number of days intervene, as to prevent the principle of there being no fraction of a day, by analogy to the rule of law in other cases, from applying; or where such terms as will warrant a construction of intent between the parties, are wanting; in such case no custom of the country shall avail to control the Law, and give a retrospect; therefore, where there was a hiring at a statute fair, held three days after *Martinmas* to serve till the *Martinmas* following; the Court held it was not a hiring for a year, although it was so considered by the custom of the country: So also, a hiring three days after *Michaelmas* till the *Michaelmas* following, is not a hiring for a year, although, by its happening to be leap year, the number of days amounted to 365. It seems, therefore, to be most clearly settled, that a *retrospective hiring* will in no case be considered as a hiring for a year; as where *Michaelmas* was on *Thursday*, and upon the *Saturday* following a man was hired from the said *Michaelmas-day* to *Michaelmas* following: But a *conditional hiring* may be a good hiring for a year; as where a woman agreed to live with a man as a servant for three months, at the rate of 3*l.* a year; and if he and she liked one another, that then she would continue his servant for the remainder of the year, and continued without any other agreement to serve the whole year; the opinion of the Court *uno ore* was, that the woman, by this hiring and service, had gained a settlement: So, where a person, in the common case, is hired upon a month's liking, and to go away on a month's wages, or a month's warning, to be at any time paid or given on either side, and the servant continues to serve a year under this hiring, it is held, that he or she thereby gains a settlement.

The Courts of justice lean so much in favour of settlements, that if, from the circumstances, a *contract for a year* appears, it is considered as good, although it was not made by one, but by *several hirings*: therefore, where a person was hired from three weeks after *Michaelmas* to the *Michaelmas* following, and on the expiration of this hiring, was hired again for a year, and there was a service for a year under both hirings; it was held, that the party gained a settlement, although the service, under the second hiring, was only for 40 days: So also, where a servant was hired from *Christmas* to *Michaelmas*, and served accordingly, and at the said *Michaelmas* was hired again by the same master for a year, but served only till *Midsummer* following; it was held, that these several hirings might be joined so as to form a hiring for a year. The general principle in these causes is, that though the *service* must be immediately continued, yet the *hiring*, under which such service is performed, need not be by one and the same contract; for if there be a continuation of the same service of 40 days, after a hiring for a year, such hiring will connect itself with any former hiring, by which the service was continued, so as to make a service for a year. The question, therefore, in this species of settlement, always is, whether the former service was discontinued? therefore where a person was hired from *Ash-Wednesday* until

Christmas, and, after serving that time, left his master, and went home to his father, where he staid about a week; this was held a discontinuance, and that it could not be connected with a subsequent hiring for a year, and service under it for eleven months, so as to gain a settlement: But the mere absence of a day between two hirings, or increase of wages on the second hiring, or the former hirings being from week to week, or absence on account of ill health, or an omission during service to make a new agreement at the expiration of the first hiring, will not make a *discontinuance*. But the servant must, at the time of the second hiring, be in a capacity to gain a settlement by hiring and service; and therefore, if a servant be unmarried at the first hiring, and married at the second hiring, they cannot be so connected as to gain a settlement under him by any length of service.

*Of service in different places; at different times; and to different masters:—*It is not necessary that the whole year's service, under any hiring for a year, should be performed in the parish where the hiring is made; and therefore if, under a hiring for a year, the servant serves half a year in one parish, and then removes with his master, and serves the other half of the year in another parish, he gains a settlement, where he serves the last 40 days; even although the master went into the other parish merely on a visit, or for his health, as to a watering-place. It is not necessary that the service should be performed in the place where the servant lives, or where the master dwells: therefore, where a house stood in two parishes, the part of the house in which the master lived, and in which the servant constantly worked, stood in one parish; but that part in which the servant lodged stood in another, and the settlement was held to be in that parish where the servant lodged: So also, where a groom was hired for a year to a Nobleman who resided at *Weybridge*, to look after his running horses, which stood in the parish of *Barrowbrook*; it was held, that a residence in this last parish for 40 days gained a settlement, although the master had neither house, nor land, nor settlement in the parish.

The 40 days' residence need not be 40 successive days; for if a servant serves more than 40 days in the whole, he gains a settlement; and where the last 40 days are in a place where no settlement can be gained, the settlement shall be in the place where the last preceding 40 days were served. In the case of alternate residence, the settlement shall be in that parish where the servant sleeps the last night of the last 40 days. There must, however, be a residence of 40 days in some one parish; and therefore, where a person was hired to a waterman, served a year by navigating a boat to and from *London*, and it did not appear, that he had, during the year slept 40 days in any one parish at different times, either in going to or returning from *London*, he having in general lived and slept in the boat; it was held, that he did not gain a settlement in either place.

The service may not only be performed in different places, but with different masters, provided there be no dissolution of the original hiring; and the servant be unmarried at the time such original hiring took place; for marriage, during the service, as has already been said, will not vacate the settlement, or entitle the master to turn the servant away.—Service with the *executor* of the master for the remainder of a year, though in a different parish from that in which the hir-

ing was made, is good: for the death of the master does not dissolve the contract: and the servant, by such service, gains a settlement in the second parish.

Of absence from service:—The year's service must be performed; and therefore, if the servant voluntarily and without sufficient cause go away, or absent himself from the service, at any period previous to the expiration of the year, this absence operates as a dissolution of the contract; and this, though done by collusion between the master and the servant, for the purpose of avoiding a settlement; if a discharge is procured under the order of a Justice, and no actual fraud be positively found: So also, an absence in the servant, arising from his criminal conduct, or even though involuntary on his part, will, under certain circumstances, prevent a settlement: thus, where a maid servant served till within three weeks of the end of the year, when her master discovering her to be with child, turned her away, and paid her her year's wages, and half a crown over; it was held an insufficient service, and no settlement gained under it; for this was a good cause to discharge her: So, where a man servant is turned away by his master before the expiration of the year, on the fact of his being the reputed father of a bastard child, he thereby loses his settlement; for the being taken into custody, and detained for this offence, renders him incapable to perform his service, and gives the master a right to discharge him.

The contract, if once dissolved by any species of absence on the part of the servant, cannot be set up again or renewed between the parties by the return of the servant, and subsequent agreement; but an absence created by the default, or fraudulent contrivance, of the master, shall not impede a settlement; as if he turn a servant away or remove him, on his falling sick; or he goes away on being disabled by accident, though he be thereby prevented from returning to his service during the remainder of the year: So also, an absence procured by the fraud of others will not prevent the party from a settlement; as where the parish officers give a servant money to leave the parish, in order to prevent his becoming chargeable when the year expires; or if a servant, before the year expires, declare to his master that he does not wish to be settled in that parish, and goes away with his master's consent, merely to avoid the gaining of a settlement: An express, or even an implied consent of the master to the absence of the servant, will prevent such absence from dissolving the contract; and the taking the servant again into his service, during the year, is evidence of his implied consent to such absence. Thus, where a man, hired from *Martinmas* to *Martinmas*, for a year, about the middle of the year absented himself from his master's service, without his consent, for above three weeks together, but on the demand of his master, returned, and served out the remainder of the year; it was held, that the absence of the servant was purged by the master's receiving him again: So also, where the servant served till within three weeks of the end of the year, when he asked his master leave to go to the herring fishery, and his master consented he should go, if he would get a man to do the work in the mean time, to his master's liking, which he did, and then received part of his wages, and went away, and returned after the year expired, and received the residue; this was held an absence with the master's consent, and therefore a good service: So also, on a hiring from *Michaelmas* to *Michaelmas*, if the servant tell

his master, at the time of hiring, that he cannot come till the day after *Michaelmas*, and the master says he will shift till that time; this is a permission of absence till the time, and will gain a settlement, although the servant quit his service the day before the ensuing *Michaelmas-day*, if he so quit by the leave of his master; and where the dispensation of service, at the end of the year, is *bonâ fide*, the absence does not dissolve the contract, though a new service is entered on before the first year actually expires; and indeed, absence with consent is always good, unless where, as has been before observed, it is an *exception* in the original contract of hiring.

9. If any person shall be bound an apprentice by indenture, and inhabit in any town or parish, such binding and inhabitation shall be adjudged a good settlement. *Stat. 3 & 4 W. & M. c. 11. § 8.*

Certificate persons, under *stat. 9 & 10 W. 3. c. 11.* cannot gain a settlement by apprenticeship. And by *stat. 12 Ann. c. 18. § 2.* Apprentices to any person, residing in any parish under a certificate, and who shall not have gained a legal settlement, shall not gain any settlement in such parish, by reason of such apprenticeship or binding: But an apprentice to a certificate man may gain a settlement by serving him in another parish, or even in the certified parish, if his master purchase an estate there; or if he serves 40 days before the master is certificated, or if the master is certificated to another parish, and the apprentice serves the last 40 days in the parish first certified.

No person, bound apprentice by any deed, writing, or contract not indented, being first legally stamped, shall be liable to be removed from any parish, &c. where he shall have been so bound an apprentice, and has resided 40 days, on account of such deed, writing, or contract not being indented only. *Stat. 31 Geo. 2. c. 11.*

An apprentice, by being bound and inhabiting in the parish where his master lives, or where his servitude is performed under the indenture, thereby gains a settlement, although it be to a master who has no right to take an apprentice; and although the apprentice, at the time he binds himself, is an infant; and though the binding is for a less term than seven years, if not avoided, on this account, by the parties themselves during the time: So also, although the apprenticeship fee is not inserted in the indentures, pursuant to *stat. 8 Ann. c. 9. § 39:* or though the indenture, or its counterpart, is not executed by the master, or the apprentice: or although the master be an infant. But there must be a binding as an apprentice, either by indenture or by deed properly stamped; and if the indentures are absolutely void, he cannot gain a settlement as a servant, by his servitude under them: So also, where a contract or agreement was made to serve for so many years, it was held not to amount to a sufficient binding as an apprentice; for a hiring as a servant, and an agreement to bind as an apprentice, are distinct and independent contracts, and never can be converted one into another. Thus, where a written agreement was made between the parents of a boy and his intended master, to bind him apprentice for seven years; but no indenture of apprenticeship was executed, pursuant to the agreement; the Court held, that although an apprenticeship was intended between the parties, yet he could not gain a settlement as a hired servant, by serving under this agreement as an apprentice, nor could he gain a settlement as an apprentice, because no indenture of apprenticeship was executed.

There must also be a *residence of 40 days* under the indenture, to give a settlement to an apprentice; but the 40 days may be at different times; and though, in the interval of these times, the apprentice gain a new settlement, yet they will connect so as to form a 40 days' residence under the indenture, and give him a settlement in the parish where he lodges the last night, although the master himself has no settlement in the parish. This species of settlement arises from the binding *and inhabiting*, and not, as in the case of a servant, from hiring and service; and, therefore, the apprentice gains his settlement in that place where he inhabits, and not where his service is performed: therefore, an apprentice who serves his master in one parish, and boards and lodges with his father in another, although such board and lodging is paid for by the master pursuant to a covenant in the indentures, does not gain a settlement in the master's parish: So also, where a boy was bound apprentice to a mariner, and served his master in the day time for a quarter of a year at his house on shore, but lay every night on board his master's ship at her moorings in the *Thames*; it was held, that he gained no lodging in the master's parish on shore: although if it had appeared, that he slept on board in his master's service, he might thereby have gained a settlement in the parish within which the ship lay; for although the service relates to one place and the inhabitancy is in another, yet that is sufficient: and therefore an apprentice to a Captain of a ship, who served and lodged the last 40 days on board the ship, while lying in her harbour, gained a settlement in the parish within which the harbour lay; the said harbour being considered by the Captain and Sailors as the proper home of the ship. So also, where an apprentice married during his apprenticeship, and served his master by day in one parish, and slept with his wife and family in a different parish, he gained a settlement in the parish where he slept; for that was the parish of his habitation: So, where a boy was bound an apprentice for three years, and after a service of more than 40 days with his master, his master died, and he, with the consent of his mistress, and before administration taken out, went from his master's house to his father's, there being no work for him to do, and continued with his father till his time expired; yet it was held, that he gained a settlement in the master's parish: So, where an apprentice, after a residence with his master of 40 days, fell sick, and on account thereof, went home into a different parish with his master's consent, and remained ill until his time expired, he gained a settlement in the master's parish.

An apprentice, while the indentures subsist, is not *sui juris*, and therefore cannot serve another person without his master's consent: but if the original master consent, such service is a service under the indenture, and he gains a settlement in the parish where he lives with such second master; although the hiring out by the first to the second master is by parol, or the agreement be made by the widow of the first master before administration taken out. As to what shall be considered as a consent on the part of a first master, it must always depend on the particular circumstances of each case.

For further matter relating to parish apprentices, see further this Dict. title *Apprentice*, 1, 2. By *stat. 42 Geo. 3. c. 46*. Overseers are to keep a register of poor children apprenticed by them, under *stat. 20 Geo. 3. c. 36*.

10. By the Common Law, founded on *Magna Carta*, no person can be removed from his own landed estate, however inconsiderable its value may be; and this Law still continues, provided such estate come to him by operation of Law: but by *stat. 9 Geo. 1. c. 7. § 5.* it is enacted, that "no person shall acquire any settlement, in any parish or place, for or by virtue of any purchase of any estate or interest in such parish or place, where the consideration for such purchase doth not amount to the sum of 30*l. bonâ fide* paid, for any longer or further time than such person shall inhabit such estate."

An estate by operation of Law is, that estate which the party gains without any act of his own. Thus, a husband may gain a settlement by residing on an estate vested in trustees for the separate use of his wife, or on an estate to be purchased by her previous to the marriage, though of the value of less than 30*l.* So the husband of an administratrix, who is entitled as a trustee to a lease for years, has the trust estate by operation of Law; and, by a residence thereon for 40 days, will gain a settlement: but it seems, that the 40 days' residence ought to be subsequent to his obtaining letters of administration; for it hath been adjudged, that a son, or next of kin, who, after his father's death, lives on an estate for years during the remainder of the term, but does not take out administration until the term is expired, does not gain a settlement, by his residence on such estate: for even a person solely entitled, but in whom the estate does not vest, for his own use, cannot, by residence thereon, acquire a settlement without obtaining letters of administration: but a residence of 40 days upon an equitable estate will gain a settlement; and therefore, if an estate be decreed to trustees to be sold to pay debts, and to divide the surplus, if any, between *A. B. and C.*; *A.* has such an estate, by operation of Law, as will gain a settlement: So also, a person entitled as executor to the remainder of a term of 99 years, of a cottage of 4*s.* a year, gains a settlement by residing on such estate 40 days: So also, where a man built a cottage upon the waste lands of a nobleman, and lived on it undisturbed for more than 20 years, and it descended to his daughter; it was held, that the daughter, or, if married, her husband, gained a settlement by a residence of 40 days upon this estate; for although her father had not originally any right to the land on which the cottage was built, yet the *disseisin* having been permitted so many years, and a descent cast, the right of entry on the land is taken away; and having thereby gained the right of possession, it is sufficient to render her irremovable: and it makes no difference, though the possession for more than 20 years was not an adverse possession; and even although the ground and cottage was originally obtained by fraud. An estate in fee belonging to a married woman, and enjoyed by her husband as tenant by the curtesy, will, after his death, give his son and heir a settlement, although under the value of 10*l.* a year: So, the widow of a man, who dies seised of a house, gains a settlement by residence therein for 40 days in right of her dower; but this species of estate will not give a settlement to the widow, where the husband was certificated; nor can she communicate a settlement thereby to any future husband, unless her dower be assigned. A conveyance from a father to his daughter, in consideration of natural love and affection, of the residue of a term determinable upon lives, is an estate by operation of Law; and a residence thereon, of 40 days, will give such daughter a settlement, although the original conside-

ration paid for such estate, by the father, was only 20s. So also, a conveyance after marriage, by the wife's father to the husband only, if it appear to be grounded on natural affection, and intended for the use both of husband and wife, is an estate by operation of Law, which will give a settlement though under the value of 30*l.* and *à fortiori*, an estate of whatever value, conveyed from a father to his son, in consideration of natural affection, although it is also expressed to be in consideration of 10*l.* paid by the son to the father: So also, where a woman, on her marriage with the copyholder of a manor, where the widows are entitled to free bench, gave a bond, that the son of her intended husband, by a former wife, should have possession of part of the copyhold estate after the death of her husband, on condition of his repairing the part of the house reserved for her, and after the death of her husband, delivered up the possession to the son, according to the bond; it was held, that the son gained a settlement by residing 40 days on this estate: So also, the surrender of an old lease, which had been many years in the family, and the taking a new one, is an estate by operation of Law: So also, a married daughter, who resides with her family on the estate of her mother, for 40 days after her mother's death, gains a settlement, although the estate was devised to the mother only during her life, and then to be sold for the benefit of her children. But residence on lease-hold premises, determinable on the death of the mother, and from the profits of which the daughter is entitled to an annuity, will not gain her a settlement; neither can a remainder-man gain a settlement by residing on the estate during the life of the tenant for life; nor a mortgagor, who, after the mortgagee has recovered possession in ejectment, is permitted to reside thereon for a particular purpose; for he is not in possession as mortgagor; nor a man who, having conveyed over his estate in trust for the benefit of his creditors, afterwards gets fraudulently into possession; nor can a wife, in any case, gain a settlement in her own right by residing, either on her own estate, or the estate of her husband, during his life.

An estate by purchase is, in contemplation of Law, that estate which a man acquires by his own act and agreement; and it has been held, that a copyhold estate surrendered by a father to his son, and to which the son is admitted, is an estate acquired by purchase, within the meaning of the statute 9 *Geo.* 1. *c.* 7. § 5. and therefore, will not gain a settlement by a residence thereon of 40 days, unless it be of the value of 30*l.* So also, is a grant of a copyhold, with a fine, heriot, and rent.

As to what purchase shall be considered as amounting to the value of 30*l.* it has been held, that an acre of land purchased for 25*l.* on which the purchaser erects a tenement, and makes other improvements, so as to enable him to sell the whole for more than 30*l.* is an estate of sufficient value: So also, a lease of 50 years of a cottage worth 5*l.* a year, at sixpence a year rent, and which after 20 years, sold for 30*l.* is an estate of sufficient value. So also, where a man purchased a house and curtilage for 39*l.* but paid only 9*l.* the remainder being paid for him by a friend, to whom he mortgaged the premises as a security, and who, after the expiration of four years, entered under his mortgage and turned out the purchaser; this was held an estate of sufficient value: So also, the mortgagee of a term for 15*l.* to whom 30*s.* were due, and 18*l.* 10*s.* more by bond and simple contract,

who, on the death of the mortgagor, takes out administration as a principal creditor, thereby acquires an estate of sufficient value to gain a settlement: Parol evidence may be given of the value, though the consideration is expressed in the deed.

The residence must be in the parish, but need not be on the estate; nor need the 40 days be all at one time, although the estate is held in common between the pauper, his mother, and his sisters.

V. ANY person may go into any parish to work in *time of Harvest*, or at any other time, so that he carry with him a *Certificate* from the Minister of the parish, and one of the Churchwardens, and one of the Overseers, that he hath a dwelling, and hath left his family, and is declared an inhabitant there; and such certificate-person shall not gain a settlement in the parish in which he goes to work. *Stat. 13 & 14 C. 2. c. 12. § 3.*

If any person whatever shall come into any parish to inhabit, and shall bring and deliver to the Churchwardens or Overseers a *Certificate*, under the hands and seals of the Churchwardens and Overseers of any other parish, or the major part of them, or under the hands and seals of the Overseers only of any place where there are no Churchwardens, to be attested respectively by two or more credible witnesses, thereby owning and acknowledging the person or persons, mentioned in the said certificate, to be inhabitants legally settled in that parish; every such certificate, having been allowed of and subscribed by two or more Justices of the Peace within the parish or place from whence any such certificate shall come, shall oblige the said parish or place to receive and provide for the person mentioned in the said certificate, together with his or her family, as inhabitants of that parish; whenever he, she, or they shall happen to become chargeable to, or be forced to ask relief of, the parish, to which such certificate was given: And then, and not before, it shall be lawful for any such person, and his or her children, *though born in that parish*, (see *ante* IV. 1.) not having otherwise acquired a legal settlement there, to be removed, conveyed, and settled in the parish or place, from whence such certificate was brought. *Stat. 8 & 9 W. 3. c. 30.*

No person whatever, who shall come into any parish by such certificate, shall gain any settlement therein, unless he shall take a lease of a tenement of the value of 10*l.*; (see *ante* IV. 6.) or shall execute some annual office, being legally placed therein. See *ante* IV. 7.—See also *ante* IV. 8 & 9.

The Witnesses, who attest the execution of such certificates, or one of them, shall make oath before the Justices who allow the same, that he saw the Parish Officers sign and seal the certificate, and that the names of the Witnesses, attesting the same, are of their own proper hand-writing; and the said justices shall also certify, that such oath was made before them; and then such certificate shall be taken to be fully proved; and shall be evidence without further proof, *Stat. 3 Geo. 2. c. 29. § 8.*—The overseers, or other persons removing back any certificated persons, shall be reimbursed such reasonable charges as they may have been put to, in maintaining and removing such persons, by the Parish Officers of the parish or place to which they are removed; the said charges being first ascertained by a Justice of the Peace of the county or place to which such removal shall be made; to be levied by distress, &c. § 9.

The Parish Officers cannot be compelled to grant a certificate; and, if granted, it is not binding, unless signed by the majority of them; and parol evidence may be given, that those who signed were not Officers of the parish; but if signed by the majority, a mistake in its direction is not material. And if a certificate be lost, and the Parish Officers refuse to grant another, yet the pauper cannot, on that account, be removed, though actually chargeable. The Justices may attest a certificate as witnesses, as well as allow it as Justices; and if it appear to have been legally allowed, it shall be intended to have been well attested; but unless the allowance, which is discretionary in the Justices, be signed, the certificate is invalid: if, however, a certificate be above 30 years old, the allowance thereof, written in the margin and signed, is sufficient, although there is no certificate of one of the witnesses; and one of the witnesses may attest the signing of the other.

A *Certificate*, after its delivery to the Parish Officers as the statute requires, virtually includes all the legitimate children of the person certified, who are born while the certificate continues in force; and if it promise to provide for the parties as man and wife, the certifying parish cannot afterwards controvert the fact of their marriage. See *ante* IV. 3. So if it be given to a woman, stating, that she is unmarried and with child, and promise to provide for the child she then goes with, they cannot object that such child is not settled in their parish, because born a bastard in another. See *ante* IV. 1. & 7 *Term Rep. K. B.* 362.

Persons residing under a certificate cannot be removed until some one or more of them become actually chargeable; and therefore, that one of the family is *likely* to become chargeable is no cause of removing them; and it is only the individual person who receives relief that shall be removed; but relief afforded by a parishioner is not sufficient, although he is reimbursed by the Parish Officers.

A *Certificate* is only conclusive upon the parish granting it, with respect to that parish to which it is granted, although it is *prima facie* evidence as to others; and it is only conclusive as between them as to the facts stated in it. But see 1 *East's Rep.* 438.

A *Certificate* is discharged by the removal of the pauper to the parish that gave the certificate; or by the pauper's voluntary return to the certifying parish; or by quitting the parish to which he was certified, if it appear that he meant to abandon the certificate: or by an order of removal from a third parish to the certifying parish; or by a second certificate. The Court, however, will not presume a certificate to be discharged: and, therefore, a clear ground of discharge must be shewn.

VI. It has already been noticed, (see *ante* IV. 4.) that by *stat.* 13 & 14 *Car.* 2. c. 12. § 1. upon complaint by the Churchwardens and Overseers to one Justice within 40 days, of a person coming to reside on a tenement under 10*l.* a year, any *two Justices* of the division might, on his being *likely to become chargeable* to the parish, remove such person to the place of his last legal settlement. And, by § 3. of the said act, if such person refused to go, or returned back, when sent, he might be committed to the House of Correction as a vagabond; and if the Parish Officers of his own parish refused to receive him, they might be indicted for their default.

This provision had long been considered as equally cruel and impolitic: see 1 *Comm.* c. 9. and the Notes there: and has at length been remedied by the interference of the Legislature.

By *stat.* 35 *Geo.* 3. c. 101. the first (and consequently the third) section of this *stat.* 13 & 14 *C.* 2. is *repealed*; and the reason assigned in the preamble of the *stat.* 35 *Geo.* 3. is, that, "many industrious poor persons chargeable to the parish, &c. where they live, merely from want of work there, would, in any other place where sufficient employment is to be had, maintain themselves and families, without being burdensome to any parish; and that such poor persons are, for the most part, compelled to live in their own parish, and not permitted to inhabit elsewhere, under *pretence* that they are *likely* to become chargeable to the parish where they go for employment: although their labour might, in many instances, be very beneficial to such parish."—This preamble also states, that the remedy intended to be applied by the granting of *certificates*, under *stat.* 8 & 9 *W.* 3. c. 30. (see *ante* V.) hath been found very *ineffectual*:—The statute then enacts, "That no poor person shall, in future, be removed, by virtue of any order of removal, from the parish or place where such poor person shall be inhabiting, to their last settlement, until such person *shall have become actually chargeable* to the parish or place in which they shall inhabit; when they may be removed by *two* Justices; in the same manner, and subject to the same appeal, and with the same powers, as might have been formerly done, with respect to persons *likely* to become chargeable."

This provision had been previously made as to members of *Friendly Societies*, (see that title) by *stat.* 33 *Geo.* 3. c. 54.

Persons convicted of larceny or other felony, rogues, vagabonds, idle and disorderly persons, and reputed thieves; as also unmarried women with child; shall be considered as actually chargeable. *Stat.* 35 *Geo.* 3. c. 101. § 5, 6.

By the same statute, Justices are impowered to suspend the removal of sick persons; the charges incurred by such suspension, to be borne by the parish to which they are removeable. § 2.—And any *Bastard*, born during such suspension, on behalf of its mother, shall belong to the mother's settlement. § 3. See *ante* IV. 1, 2.

A single woman living in service with her master, is not removeable even since this act 35 *Geo.* 3. against the consent of herself and her master; though adjudged by the order of removal to be with child, and therefore chargeable: that act not extending to make persons removeable who were not proper objects of removal before; but only to make certain descriptions of persons excepted out of the act, liable to be removed, though not in fact chargeable, if otherwise proper objects of removal. 3 *East's Rep.* 563.

Officers refusing to receive a pauper, removed by warrant of two Justices, shall forfeit *5l.* to the use of the Poor: to be levied by distress. *Stat.* 3 *W.* 3. c. 11. § 10.

Persons, who shall unlawfully return to the parish from whence they are legally removed, shall be deemed idle and disorderly persons, and may be committed to the House of Correction for one month. *Stat.* 17 *Geo.* 2. c. 5. See title *Vagrants*.

It seems, that nearly all the determinations, as to orders for removal of persons *likely* to become chargeable, now apply *mutatis mutandis*, as to the removal of those who are actually so.

One who is resident on an estate granted to him for lives, in consideration of two guineas fine, and one shilling rent, cannot be removed therefrom, though actually chargeable. 5 *East's Rep.* 40.

The first step which the Parish Officers are to take, in order to procure the removal of a pauper, chargeable to their parish, is, to make a *Complaint* to a Justice of the Peace: for the complaint is the foundation of the Justice's jurisdiction. The *order of removal*, therefore, must state not only a complaint, but that it is upon complaint of the Parish Officers, and shew in certain, the persons, with their names, who are become chargeable; and the order cannot remove more persons than the officers have complained of.

The next proceeding is *The Examination*; for this order must state, that the removal was made, on due examination; it need not, however, state, that the examination was on oath; but ought to shew that the pauper was summoned and heard; but even this is not, in all cases, absolutely necessary. The examination must be taken before two Justices, and it must be by the same two Justices who signed the order; and therefore, an order stating it, in the alternative, to have been taken "before us or one of us," is bad. The two Justices also must sign the order in the presence of each other; and the Justices of one county cannot make an order of removal on an examination taken and transmitted to them by Justices of another county, although such examination be verified by oath. An order signed by two Justices separately, and in different counties, is not *void*, but only voidable on appeal.

An order of Justices removing *M. F.* wife of *P. F.* a *Scotchman*, who never gained a settlement in *England*, and their children, to *her* last legal settlement, which order was stated on the face of it to be under the examination of the husband, and with the consent of him and his wife, was held good. 5 *East's Rep.* 115.

The Mutiny Acts enable two Justices to take the examination of a soldier respecting his settlement, and direct them to give an attested copy of it, which is to be by him delivered to the commanding officer in order to be produced when required, and the acts make such attested copy evidence: no other attested copy than that given to the soldier is evidence: but the original examination is admissible evidence. 5 *Term Rep. K. B.* 704: 6 *T. R.* 534.

The next proceeding is the *Adjudication*; for an order of removal cannot be good, if it omit to adjudge that the persons complained of actually became chargeable to the parish complaining, and that they are last legally settled in the parish to which they are intended to be removed. An order, removing nurse children to their derivative settlement, is good, without stating the death of the parent, or adjudging the place, to which they are removed, to be the settlement of their parents. The order must state, that the Justices are Justices of the Peace for, and not in, the county; but it need not state that they were of the division where the pauper lives; and it is enough to name the county in the margin of the order; for the margin of an order of removal is part of the order itself: if, however, two counties are named, and it state them to be Justices of the counties aforesaid, it is bad.

The power given to a Justice, on a pauper's returning to the parish from whence he was removed, cannot be exercised, unless a previous charge be made on oath against the pauper who returns; and it seems that, previous to the repeal of *stat. 13 & 14 Car. 2. c. 12*, this



offence must have been proceeded against, under *stat.* 17 *Geo.* 2. c. 5, only; for an order of removal does nothing more than prevent the party thereby removed from returning in a state of vagrancy.

If an order of removal be made, and the parish, to which the pauper is thereby removed, neglect to appeal to the next General or Quarter Session, pursuant to *stats.* 13 & 14 *Car.* 2. c. 12: 3 & 4 *W. & M.* c. 11. § 10, such order becomes conclusive, and no new settlement can be gained but by some act subsequent to such removal; but it is only conclusive between those two parishes, and the persons who are mentioned in the order. To render an order thus final, for want of an appeal, it must not only be a legal order, but it must be subsisting; for if it be deserted or made to an improper place, the neglect to appeal will have no effect. But see 7 *Term Rep.* K. B. 200.

If an order of removal be appealed against, and reversed, two Justices may remove the pauper back to the parish from whence he was sent; but if the order be confirmed, it is then conclusive that the appellant parish is the place of the pauper's last legal settlement; and of course he cannot be removed to any other parish, on any settlement gained previous to the confirmation of the order. But if an order of removal be reversed on appeal, the respondent parish may remove the pauper to a third parish on a settlement gained previous to the former removal; for an order reversed is only conclusive as to the appellant parish; and a bad order reversed, not on the merits, but merely for want of form, is not conclusive on either parish.

POPE, *Papa*.] A term antiently applied to some clergymen in the *Greek* church; but by usage particularly appropriated in the *Latin* church to the bishop of *Rome*, and who formerly had great authority in these kingdoms. As to the encroachments of the See of *Rome*, it is said to be the general opinion, that Christianity was first planted in this island by some of the *Eastern* church; which is very probable, from the antient *Britons* observing *Easter* always on the fourteenth day of the month, according to the custom of the *East*; but the *Saxons*, being converted about the year 600, by persons sent from *Rome*, and wholly devoted to the interest thereof, it could not be expected that such an opportunity, of enlarging the Jurisdiction of that See, should be wholly neglected; and yet there are few instances of the Papal power in *England* before the *Norman* conquest; though four or five persons were made Bishops by the Pope at the first conversion, and there was an instance or two of appeals to *Rome*, &c. But Pope *Alexander II.* having favoured and supported *William the First*, in his invasion of this kingdom, made that a handle for enlarging his encroachments; and in this King's reign, began to send his legates hither. *Ermenfroy*, Bishop of *Sion*, was the first who had ever appeared with that character in any of the *British* islands. And afterwards *Paschal II.* prevailed with *Henry I.* to give up the donation of bishopricks. In the reign of *Stephen*, the pontifical authority was permitted to make farther encroachments: appeals to the Pope, which had been always strictly prohibited, became now common in every ecclesiastical controversy. And in the reign of *Henry II.* Pope *Alexander III.* exempted all clerks from the secular power: indeed, this King at first strenuously withstood those innovations; but on the death of *Becket*, who, for having violently opposed the King, was slain by some of his servants, the Pope got such an advantage over him, that he was never able to execute the Constitutions of *Clarendon*. And not

long after this, by a general excommunication of the King and People, for several years, because they would not suffer an Archbishop to be imposed on them, *John* was reduced to such straits, that he surrendered his kingdoms to Pope *Innocent III.* to receive them again, and hold them of him under the rent of a thousand marks. And in the reign of *Hen. III.* partly from the profits of our best church benefices, which were generally given to *Italians*, and others residing at the court of *Rome*, and partly from the taxes imposed by the Pope, there went yearly out of the kingdom seventy thousand pounds sterling; a great sum in those days: the nation being thus burdened and under necessity, was obliged to provide for the prerogative of the Prince, and the liberties of the People, by many strict laws. And hence, in the reign of *Edw. I.* it was declared in Parliament, the Pope's taking upon him to dispose of *English* benefices to aliens, was an encroachment not to be endured; and this was followed with the *stat.* 25 *Ed.* 3. *st.* 6, called the Statute of Provisors against Popish bulls, and disturbing any patron to present to a benefice, &c. See also the *stats.* 12 *R.* 2. *c.* 15: 16 *R.* 2. *c.* 5: 2 *H.* 4. *c.* 3, 4: 7 *H.* 4. *c.* 8: 3 *H.* 5. *c.* 4: 25 *H.* 8. *c.* 21: 28 *H.* 8. *c.* 16.—The maintaining by writing, preaching, &c. the Pope's power here in *England*, is made a *præmunire* upon the first conviction; and High Treason on the second. *Stat.* 5 *Eliz.* *c.* 1. In the construction of which statute, it has been held, that he who, knowing the contents of a Popish book, written beyond sea, brings it over, and secretly sells, or conveys it to a friend; or having read the book, or heard of its contents, doth after in discourse allow it to be good, &c. is in danger of the statute; but not he who, having heard thereof, buys and reads the same. *Seldon's Janus Anglor:* *Davis* 90, &c. *Dyer* 282: 2 *Inst.* 580: See this Dictionary, titles *Papist*; *Bulls*; *Præmunire*.

POPISH RECUSANTS; See *Papists*.

POPULAR ACTION, An action given by statute to any one who will sue for a penalty. See titles *Action*; *Information*; *Limitation of Actions*.

POPULATION. An account ordered to be taken of the Population of *Great Britain*, and of the increase and diminution thereof. *Stat.* 41 *Geo.* 3. *G. B.* *c.* 15.

PORT, *Portus*.] A harbour or place of shelter, where ships arrive with their freight, and customs for goods are taken. The Ports in *England* are *London*, *Ipswich*, *Yarmouth*, *Lynn*, *Boston*, *Hull*, *Newcastle*, *Berwick*, *Carlisle*, *Chester*, *Milford*, *Cardiff*, *Gloucester*, *Bristol*, *Bridgwater*, *Plymouth*, *Exeter*, *Poole*, *Southampton*, *Chichester*, and *Sandwich*; all which are declared lawful Ports, & *infra corpus comitatûs*: to these Ports there are certain members belonging, and a number of creeks, where commonly officers are placed, by way of prevention of frauds in the customs; but these are not lawful places of exportation or importation, without particular licence from the Port or Member under which they are placed. *Lex Mercat.* 132. See further, titles *Harbours* and *Havens*.

PORTER, In the circuit of Justices; An officer who carries a white rod before the Justices in *eyre*, so called à *portando virgam*. *Stat.* 13 *Ed.* 1. *c.* 41. See *Vergers*. There is also a Porter bearing a verge before the Justices of either Bench. *Cowell*.

PORTER of the door in the Parliament-house. An officer belonging to that high and honourable Court, and enjoys privileges accordingly. *Crom. Juris.* 11.

PORTERAGE, A kind of duty paid at the Custom-house to those who attend the water-side, and belong to the package-office; and these porters have tables set up ascertaining their dues for landing of stranger's goods, and for shipping out the same. *Merch. Dict.*

PORTGREVE, or **PORTREVE**, *Portgrevius*; Sax. *portgerefe*; *urbis vel portus prefectus*.] A Magistrate in certain sea-coast towns; and as *Camden*, in his *Britannia*, says, the Chief Magistrate of *London* was antiently so called, as appears by a charter of King *William* the Conqueror to the City.

Instead of the Portgreve, *Richard* the First ordained two bailiffs, but presently after him King *John* granted them a Mayor for their yearly magistrate. See title *London*.

PORTION, That part of a person's estate which is given or left to a child.

If a term of years settled to raise a daughter's Portion is so short that the ordinary profits of the land are not sufficient, the Court of Chancery may order timber to be felled, &c. to make up the money at the time appointed. *Prec. Ch.* 27.

A sale of lands has been also decreed, for payment of Portions devised to be paid at a certain time out of the rents and profits, where they were not judged sufficient for raising the money; although the land subject to the Portions was given to others in remainder. *Ibid.* 396. See *Treat. of Equity*, lib. 1. c. 6. § 18: lib. 2. c. 8. § 6, 7: *Vin. Abr.* title *Portions*: and this Dictionary, titles *Marriage*; *Trustees*; *Uses*; *Will*, &c.

PORTIONER, *Portionarius*.] Where a parsonage is served by different ministers alternately, the ministers are called Portioners; because they have but their Portion, or proportion, of the tithes or profits of the living: the term Portion is also applied to that allowance which a Vicar commonly has out of a rectory or impropriation. See *stat.* 27 *H.* 8. c. 28.

PORTMEN. The burgesses of *Ipswich* are so called. So also are the inhabitants of the *Cinque Ports*, according to *Camden*.

PORTMOTE, from *Portus* & *gemote*, conventus.] A Court kept in haven-towns, or ports; and is called the *Portmote Court*. 43 *Eliz.* c. 15. The Portmote, or *portmanuimote*, i. e. Portmen's Court, is said to be held not only in port towns, as generally rendered, but in inland towns—the word *port* in *Saxon* signifying the same with city.

PORTSALE, A public sale of goods to the highest bidder; or of fish presently on its arrival in the port or haven. See *stat. antiq.* 35 *H.* 8. c. 7.

PORTSOKA, or **PORTSOKNE**. The suburbs of a city, or any place within its jurisdiction; from the Saxon *port*, *civitas*, and *soca*, *jurisdictio*. *Somner's Gavelkind*, 135.—*Hen.* III. granted by charter to the City of *London*—*Quietantiam murdri*, &c. *infra urbem*, & in *Portsokne*, viz. within the walls of the city, and the liberties without the walls. *Placit. Temp.* Ed. 1.

PORTUAS, mentioned in *stat.* 3 & 4 *Ed.* 6. c. 10; and reckoned amongst books prohibited by that statute;] A breviary. *Cowell*. It is also, by some called *portuos* or *portuose*.

POSITIVE PROOF, See title *Evidence*.

POSSE, An infinitive mood, used substantively, to signify a possibility; such a thing is *in posse*, that is, such a thing may possibly be; but, of a thing in being, we say it is *in esse*.

POSSE COMITATUS, The power of the County; according to *Lambard*, includes the aid and attendance of all knights, and other men above the age of fifteen, within the county; because all of that age are bound to have harness, by the statute of *Winchester*: but ecclesiastical persons, and such as labour under any infirmity, are not compellable to attend. Persons able to travel are required to be assistant in this service. It is used where a riot is committed, a possession is kept on a forcible entry, or any force or rescue made contrary to the commandment of the King's writ, or in opposition to the execution of Justice. *Stat. 2 H. 5. c. 8.*

But with respect to writs that issue, in the first instance, to arrest in civil suits, such as bailable *latitat*, bill of *Middlesex*, or *capias*, &c. the Sheriff is not bound to take the *Posse Comitatus*, to assist him in the execution of them. See title *Escape*. Though he may, if he pleases, on forcible resistance to the execution of the process. See 2 *Inst.* 193: 3 *Inst.* 161.

Sheriffs are to be assisting to Justices of Peace in suppressing riots, &c. and raise the *Posse Comitatus*, by charging any number of men to attend for that purpose, who may take with them such weapons as shall be necessary; and they may justify the beating, and even killing such rioters as resist, or refuse to surrender; and persons, refusing to assist herein, may be fined and imprisoned. See *stats.* 17 *R. 2. c. 8*: 13 *Hen. 4. c. 7*: 2 *Hen. 5. c. 8*: *Lamb.* 313. 318: *Crompt.* 62: *Dalt. c. 46*: 2 *Inst.* 193.

Justices of Peace, having a just cause to fear a violent resistance, may raise the *Posse* in order to remove a force in making an entry into or detaining lands: and a Sheriff, if need be, may raise the power of the county to assist him in the execution of a precept of restitution; therefore, if he make a return thereto, that he could not make a restitution by reason of resistance, he shall be amerced. See titles *Forcible Entry*; *Sheriff*.

Also it is the duty of a Sheriff, or other minister of Justice, having the execution of the King's writs, and being resisted in endeavouring to execute the same, to raise such a power as may effectually enable them to quell such resistance; though it is said not to be lawful for them to raise a force for the execution of a civil process, unless they find resistance. 2 *Inst.* 193: 3 *Inst.* 161.

It is lawful for a Peace Officer, or a private person, to assemble a competent number of people, and sufficient power to suppress rebels, enemies, rioters; but there must be great caution, lest, under a pretence of keeping the peace, they cause a greater breach of it; and Sheriffs, &c. are punishable for using heedless violence, or alarming the country in these cases, without just grounds. See further, titles *Sheriff*; *Riot*; *Contempt*.

POSSESSIO FRATRIS, Where a man hath a son and a daughter by one *venter*, (i. e. wife,) and a son by another *venter*, and dies; if the first son enters and dies without issue, the daughter shall have the land, as heir to her brother; although the second son, by the second *venter* is heir to the father. But if the eldest son dies without issue, not having made an actual entry and seisin, the younger brother by the second wife, as heir to the father, shall enjoy the estate; not the sister. *Co. Litt.* 11. 15.

Lands are settled on a man, and the heirs of his body, and he hath issue a son and daughter by one woman, and a son by another, and

dieth; and then the eldest son dies, before any entry made on the lands either by his own act, or by the possession of another; the younger brother shall inherit, he claiming as heir of the body of the father, and not generally, as heir to his brother; yet, if the eldest brother enter, and by his own act gained the possession; or if the lands were leased for years, or in hands of a guardian, there the possession of the lessee or guardian doth vest the fee in the elder brother, and then on his death the sister shall inherit, as heir to her brother, for there is *Possessio Fratris*. 3 *Rep.* 42. There can be no *Possessio Fratris* of a dignity; in such case the younger brother is *heres natus*: Lord Grey, being created a Baron to him and his heirs, had issue a son and a daughter, by one venter, and a son by another; and after his death, the eldest being possessed of the barony, and dying without issue, it was adjudged, that the younger brother, and not the sister, should have it. *Cro. Car.* 437: See title *Descent*.

POSSESSION, *Possessio, quasi pedis positio*.] Is either actual, where a person actually enters into lands or tenements descended or conveyed to him; or, in Law, when lands, &c. are descended to a man, and he hath not actually entered into them. So before, or till an office is found of lands escheated to the King by attainder, he hath only a Possession in law. *Bract. lib.* 2. c. 17.

Possession, beyond the memory of man, establishes a right; but if by the knowledge of man, or proof of record, &c. the contrary is made out, though it exceeds the memory of man, this shall be construed within memory. *Co. Litt.* 115. A long possession the Law favours, as an argument of right, although no deed can be shewn; rather than an antient deed, without Possession. *Co. Litt.* 6. Continued quiet Possession is a violent presumption of a good title; and where two persons enter into and claim the same land, the Possession will always be adjudged in him who has right, &c. 2 *Inst.* 256. 323.

He who is out of Possession, if he brings his action, must make a good title: and to recover any thing from another, it is not sufficient to destroy the title of him in Possession; but you must prove your own better than his. *Vaugh.* 8. 58. 60.

In an action against a person for digging of coney-boroughs in a common, &c. it was held that the action, being grounded on the Possession of the tenement, to which the common belonged, the plaintiff need not shew a title; and in this case the defendant may be a stranger; besides the title is not traversable, but ought to be given in evidence upon the trial of the issue. 3 *Salk.* 12.

A defendant in trespass, &c. for taking cattle damage feasant has been allowed to justify the taking on his Possession, without shewing his title; the matter of justification being collateral to the title of the land. 2 *Mod.* 70: 3 *Salk.* 220. See title *Trespass*.

In replevin, if defendant had the Possession, it is a good bar against the plaintiff if he has no title; but there cannot be a return, unless he shews a property in the goods. See title *Replevin*.

Action of the case lies for shooting at and frightening away ducks from a decoy pond, which is in the plaintiff's Possession, without shewing that he had any property in them. 3 *Salk.* 9.

A man on a lease and release of lands, &c. is in Possession to all intents, except bringing trespass, which cannot be without actual entry, *pedis positio*. 2 *Lil. Abr.* 335. And to make Possession good on entry, the former possessor and his servants, &c. are to be re-

moved from the land; and if Possession be lost by entry of another, it must be regained by re-entry, *Œc. Pasch.* 1650.

A person in Possession may bring an action, for loss of his shade, shelter, fruit, when trees are injured; and he in reversion for spoiling the trees. *3 Lev.* 209. One, in defence of his lawful Possession, may assemble his friends to resist those who threaten to make an unlawful entry into a house, *Œc. 5 Ref.* 91. There is an unity of Possession, when by purchase the seignior and tenancy become in one man's Possession. *Kitch.* 134. See *16 Vin. Abr.* 454. 460: *3 Comm.* c. 10.; and this Dictionary, titles *Ejectment*; *Entry*; *Writ of Right*; and other appropriate titles.

The Possession of lands *in fee simple* uninterruptedly for 60 years, is at present a sufficient title against all the world: and cannot be impeached by any dormant claim whatsoever. *3 Comm.* c. 10. *p.* 196. This being the term of limitation in a writ of right. See this Dictionary, title *Limitation of Actions* II. 1.

Mr. *Christian*, apparently not adverting correctly to the terms of the above sentence of *Blackstone*, says, the position there laid down is far from being universally true. His subsequent explanation is correct, but does not impeach the rule stated by the learned Commentator. An uninterrupted Possession for 60 years, (says Mr. C.) will not create a title, where the claimant or demandant had no right to enter within that time; as where an estate *in tail for life*, or *for years*, continues above 60 years, still the *reversioner* may enter and recover the estate, the Possession must be adverse: and *Coke* says, it has been resolved, that though a man has been out of Possession of land for 60 years; yet, if his entry is not tolled, he may enter and bring any action of his own Possession; and if his entry be congeable, and he enter, he may have an action of his own Possession. *4 Co.* 11. *b.*

POSSIBILITAS, Is taken from an act wilfully done, and *Impossibilitas* for a thing done against our will. *Leg. Alfred. cap.* 38: *Ll. Canuti*, c. 66: *Leg. Sax. Edw. senior.* c. 88.

POSSIBILITY, Is defined to be an uncertain thing, which may or may not happen. *2 Lil. Abr.* 336. And it is either near or remote; as for instance: Where an estate is limited to one, after the death of another, this is a near Possibility; but that one man shall be married to a woman, and then that she shall die, and he be married to another; this is a remote or extraordinary possibility: And the Law doth not regard a remote Possibility, that is never like to be. *15 H. 7. 10: Hardr.* 417: *2 Ref.* 50. At Common Law, a Possibility could not be granted or assigned; but where such Possibilities are real interest, they will be attended to accordingly in equity: Thus, a covenant for a valuable consideration, to settle or convey a Possibility, when it arises, will be enforced. See *Treat. Eq.* 202: and this Dictionary, titles *Assignment*; *Release*.

If husband and wife are tenants in special tail, and the husband only levies a fine of the lands, *Œc.* the wife's estate is turned into a Possibility, and only reducible by entry, if she survive. *Hob.* 257.

Where a lease is made for life, the remainder to the right heirs of *J. S.* this is good; for by common Possibility *J. S.* may die during the life of tenant for life. *2 H. 7. 13: 3 Shep. Abr.* 36.

A man made a lease to his brother for life, and that if he married, and his wife should survive, then she should have it for her life; the

lessee, before he married, made a feoffment of the lands to another, and afterwards the lessor levied a fine to him; then the lessee married, and died, and his wife survived: And it was held, that the remainder to the wife for life was gone by this feoffment, and the Possibility of her having it was included in the fine, which was likewise barred. *Moor* 554. See title *Fine of Lands*.

A testator, possessed of a lease for years, devised the profits thereof to *W. R.* for life, remainder to another; and afterwards the devisee for life entered with the assent of the executor, and then he in remainder for life assigned all his interest to another, and after the devisee for life died; it was resolved, that this assignment was void, because, whilst the devisee for life was living, he in remainder had only a Possibility to have the term; for the devisee for life had an interest in it *sub modo*, and might have survived the whole term. 4 *Rep.* 64.

The devise of the Possibility of a term is void; as where a term is devised to *A.* for life, remainder to *B.*, and *B.* devises this remainder to *C.* and dies; and then *A.* dies; this devise to *C.* is void, and the executors of *B.* shall have it. 3 *Lev.* 427. See titles *Will; Remainder*.

A Possibility founded on a trust, differs from a mere Possibility; the first may be devised, but the other cannot. *Moor* 808.

POST, A swift or speedy messenger to carry letters.

POST-OFFICE.—The Office for the conveyance of letters through the Kingdom, as well from foreign parts, as from place to place within *Great Britain*.—This was attempted by the Parliament in 1643; an office was erected first in 1657, during the Usurpation, and after the restoration established by *stat.* 12 *Car.* 2. c. 35. See 1 *Comm.* 321.

The rates of letters have been from time to time altered, and some further regulations added by *stats.* 9 *An.* c. 10: 6 *G.* 1. c. 21: 26 *G.* 2. c. 13: 5 *Geo.* 3. c. 25: 7 *G.* 3. c. 50: 28 *G.* 3. c. 9: 39 *G.* 3. c. 76: 41 *G.* 3. (*U. K.*) c. 7: 42 *G.* 3. c. 101: 45 *G.* 3. c. 11: 46 *G.* 3. c. 73 & 92: 48 *G.* 3. c. 116. and penalties are imposed in order to confine the carriage of letters to the public office only; except in some few cases.

The privilege of letters coming free of postage to and from Members of Parliament was claimed by the House of Commons in 1660, but dropped, on a private assurance that it should be allowed.—And accordingly a warrant used to be issued to the Postmaster-General to allow the same; till at length it was expressly confirmed by *stat.* 4 *Geo.* 3. c. 24; which, and *stats.* 24 *Geo.* 3. st. 2. c. 37: 35 *Geo.* 3. c. 53. add many new regulations; rendered necessary by the great abuses crept into the practice of franking. This privilege of franking is still further regulated by *stat.* 42 *Geo.* 3. c. 63: & 46 *Geo.* 3. c. 61: and is by several acts extended to public offices and boards in particular departments of government.

The preamble of the ordinance made in 1657, states that the establishing one General Post-Office, besides the benefit to commerce, and the convenience of conveying public dispatches, “will be the best means to discover and prevent many dangerous and wicked designs against the Commonwealth.” The policy of having the correspondence of the Kingdom under the inspection of Government is still continued; for by a warrant from one of the Principal Secretaries of State, letters may be detained and opened. 1 *Comm.* 322. *edit.* 1793, n. 28. But by *stat.* 9 *Ann.* c. 10. § 40, if any person shall, with

out such authority, wilfully detain or open any letter or packet delivered to the Post-Office, he shall forfeit 20*l.* and be incapable of future employment in the Post-Office.—It has been decided, that no person is subject to this penalty but those who are employed in the *Post-Office*. 5 *Term Rep.* 101. And see *stat.* 24 *Geo.* 3. *stat.* 2. *c.* 37. § 4, 5, as to opening foreign letters suspected to contain prohibited goods; and *stat.* 35 *Geo.* 3. *c.* 62. & 47 *Geo.* 3. *st.* 2. *c.* 53. enabling the Postmaster-General to open and return letters to foreign parts in consequence of certain political emergencies.

By 7 *Geo.* 3. *c.* 50. enforced by 42 *Geo.* 3. *c.* 81, Persons employed in the Post-Office, secreting any letters containing securities for money, &c. are punished as felons without benefit of Clergy: as are also persons procuring such offence.

It was determined so long ago as 13 *Will.* 3. in the case of *Lane v. Cotton*, by three Judges of the Court of *K. B.* though contrary to Lord C. J. *Holt's* opinion, that no action could be maintained against the Postmaster-General, for the loss of bills or articles sent in letters by the Post. 1 *Ld. Raym.* 646. 1 *Comm. Rep.* 100. A similar action was brought against Lord *Le Despenser*, and Mr. *Carteret*, Postmaster-General in 1778, to recover a bank note of 100*l.* which had been sent by the Post and was lost. Lord *Mansfield* delivered the opinion of the Court, that there was no resemblance, or analogy, between the Postmasters and a common Carrier; and that no action for any loss in the Post-Office could be brought against any person, except him, by whose actual negligence the loss accrued. *Cowp.* 754—765. For this reason, it is recommended by the Secretary of the Post-Office, to cut bank notes, and to send one half at a time. This is the only safe method of sending bank notes; as the Bank would never pay the holder of that half which had been fraudulently obtained.

Many attempts were made by Postmasters in country towns, to charge $\frac{1}{2}$ *d.* and 1*d.* a letter on delivery, at the houses in the town, above the Parliamentary rates; under the pretence, that they were not obliged to carry the letters out of the Office *gratis*. But it was repeatedly decided, that such a demand is illegal, and that they are bound to deliver the letters to the inhabitants, within the usual and established limits of the town, without any addition to the rate of postage. 3 *Wils.* 443: 2 *Black. Rep.* 906: 5 *Burr.* 2709: 2 *Roll. Rep.* 906: *Cowp.* 182.

By 46 *G. 3. c.* 92 Letters may be conveyed to and from places, not being post towns, and charged with extra prices.

PENNY-POST. Letters or parcels are conveyed daily by the establishment, originally called the Penny-post, to and from all places within the Bills of Mortality, and ten miles or more distance from the General Post-Office, in *London*. See *stat.* 9 *Ann. c.* 10. 5 *Geo.* 3. *c.* 25: 34 *Geo.* 3. *c.* 17: 41 *Geo.* 3. (*U. K.*) *c.* 7. § 3: 45 *Geo.* 3. *c.* 11. § 4. under which the original rate of 1*d.* is in all cases advanced to 3*d.* and in some to 3*d.*

POST, writ of entry in. A writ given by the statute of *Marlbridge*, (52 *Hen.* 3.) *c.* 30; which provides, that when the number of alienations or descents exceed the usual degrees, a new writ shall be allowed, without any mention of degrees at all. And accordingly, this writ has been framed, which only alleges the injury of the wrongdoer, without deducing all the intermediate titles from him to the tenant: stating it in this manner; that the tenant had no legal entry

unless *after*, or subsequent to, the *ouster* or injury done by the original dispossession; "*non habuit ingressum nisi post intrusionem quam Gulielmus in illud fecit*;" 3 *Comm.* 182. and see this Dictionary title *Entry*.

POST CONQUESTUM, *after the Conquest*: Words inserted in the King's title, by King *Edw. I.* and constantly used in the time of *Edw. III.* *Claus. 1 Edw. 3. indors. m. 33.*

POST DIEM, Where a writ is returned after the day assigned, the *custos brevium* hath a fee of 4d. whereas he hath nothing if it be returned at the day.

POST-DISSEISIN, Is a writ that lies for him who, having recovered lands or tenements by a force of *novel disseisin* is again disseised by the former disseisor. See title *Assise of Novel Disseisin*.

POSTEA, The return of the Judge, before whom a cause was tried, after a verdict, of what was done in the cause; and is endorsed on the back of the *Nisi Prius* record: It began thus in *Latin*, *Postea, die & loco*, &c. in *English*, *Afterwards* (i. e. after joining issue and awarding the trial), on the *day* named, the plaintiff and defendant appear at the *place* of trial, &c. See titles *Pleading; Record; Practice; Trial*.

POSTERIORITY, *Posterioritas*.] Signifies the being or coming after, and is a word of comparison and relation in tenures, the correlative whereof is *Priority*: As a man holding lands or tenements of two lords, holds of his antienter lord by *Priority*, and of his latter lord by *Posteriority*. *Staundf. Prærog.* 10, 11: 2 *Inst.* 392. See titles *Priority; Tenure*.

POST-FINE, A duty to the King for a fine formerly acknowledged in his Court, paid by the cognisee *after* the fine is fully passed; See title *Fine of Lands, I.*

POST-HORSES: See titles *Horses, Taxes*.

POSTHUMOUS Child. A child born after his father's death, &c. By *stat. 10 & 11 W. 3. c. 16*, *Posthumous* children are enabled to take estates by remainder, in settlements, in the same manner as if born in their father's lifetime, though no estate be limited to trustees to preserve them till they come *in esse*. See titles *Infant, II.; Remainder*.

POST-MAN, See *Pre-audience*.

POST-NATUS, The second son, or one born afterwards; often mentioned in *Bracton*, *Glanville*, *Fleta*, and other antient writers. In another sense it is distinguished from *ante-natus* in the case of aliens, becoming Subjects; and as to *Post-nati* and *ante-nati*, it was solemnly adjudged, that those who after the descent of the Crown of *England* to King *James I.* were born in *Scotland*, were not aliens here in *England*: But the *ante-nati*, or those born in *Scotland*, before the descent, were aliens here, in respect of the time of their birth. *Calvin's case*. Children of persons attainted of Treason, born after the King's pardon, may inherit lands; though not those born before, &c. *Co. Lit.* 391. See this Dictionary, titles *Descent, I. VI; Alien; Attainder, &c.*

POST-TERMINUM, The return of a writ, not only after the return thereof, but *after the term*; on which the *custos brevium* takes a fee. It is also used for the fee so taken.

POSTULATION, *Postulatio*.] A petition. Formerly when a Bishop was translated from one bishopric to another, he was not elected to the new see; for the Canon Law is *electus non potest elegi*;

and the pretence was, that he was married to the first church, which marriage could not be dissolved but by the Pope; thereupon, he was petitioned, and consenting to the petition, the Bishop was translated, and this was said to be by Postulation: But this was restrained by *stat. 16 R. 2. c. 5*. See titles *Pope; Papists; Bishops*.

Postulations were made on the unanimous voting any person to a dignity or office; of which he was not capable by the ordinary canons or statutes, without special dispensation: And by the antient customs, an election could be made by a majority of votes; but a Postulation must have been *nemine contradicente*.

POUND, *Parcus*.] Generally any place inclosed, to keep in beasts; but especially a place of strength to keep cattle which are distrained, or put in for any trespass done by them, until they are replevied or redeemed. In this signification, it is called Pound overt and Pound covert; a Pound overt is an open Pound, usually built on the lord's waste, and which he provides for the use of himself and tenants, and is also called the lord's or the common Pound; and a back-side, yard, &c. whereto the owner of beasts impounded may come to give them meat, without offence, is a Pound overt: A Pound covert is a close place, which the owner of the cattle cannot come to, without giving offence; such as a house, &c. *Kitch. 144. Terms de Ley: Co. Lit. 96*.

There is a difference between a common Pound, an open Pound, and a close Pound, as to cattle impounded: For where cattle are kept in a common Pound, no notice is necessary to the owner to feed them; but if they are put into any other open place, notice is to be given; and he is then also bound to feed them; and if beasts are impounded in a Pound close, as in part of the distrainer's house, stable, &c. he is to feed them at his peril. *Co. Lit. 47*. A distress of household goods, or dead chattels, which are liable to be stolen, or damaged by the weather, ought to be impounded in a Pound covert; else the distrainer must answer for the consequences; and for this purpose, under *stat. 11 Geo. 2. c. 19*, any person distraining for rent may turn any part of the premises upon which a distress is taken into a Pound, *pro hac vice* for securing such distress. See title *Distress*, II.

A common Pound belongs to a township, lordship, or village; and ought to be in every parish, kept in repair by them who have used to do it time out of mind: The oversight whereof is to be by the Steward in the Leet, where any default herein is punishable. *Dyer 288: Noy 52*.

POUNDAGE, A subsidy to the value of twelve-pence in the pound, antiently granted to the King, of all merchandize exported or imported. See this Dictionary, title *Customs on Merchandize*.

POUND-BREACH. If a distress be taken and impounded, though without just cause, the owner cannot break the pound, and take away the distress; if he doth, the party distrained may have his action, and retake the distress wherever he finds it: And for pound breaches, &c. action of the case lies, whereon treble damages may be recovered. *Co. Lit. 261: stat. 2 W. & M. st. 1. c. 5*. Also Pound-breaches may be inquired of in the Sheriff's turn; as they are common grievances, in contempt of the authority of the Law. *2 Hawk. P. C. c. 10. § 56*.

POUND IN MONEY, from the *Sax. fund, i. e. pondus*.] Twenty shillings: In the time of the Saxons it consisted of 240 pence, as it doth now: and 240 of those (silver) pence weighed a pound, but 720 scarce weigh so much at this day. *Lambard 219*.

POUR FAIR PROCLAIMER, *que null inject Fimes ou Ordures en Fosses, ou Rivers, pres Cities, &c.*] An antient writ directed to the Mayor or Bailiff of a city or town, requiring them to make proclamation, *That none cast filth into places near such city or town to the nuisance thereof: and if any be cast there already, to remove the same; founded on the stat. 12 R. 2. c. 13. F. N. B. 176.* Indictments for nuisances now supply the place of this writ. See title *Nuisance*.

POURPARTY, *Propars, propartis, propartia*, Fr. *pourpart: pro parte.*] That part or share of an estate, first held in common by parceners, which is by partition allotted to them. Thus it is contrary to *pro indiviso*: For to make Pourparty is, to divide the lands that fall to parceners, which before partition, they hold jointly and *pro indiviso*. *Old Nat. Brev. 11.* See title *Parceners*.

POURPRESTURE, *Pourprestura*, from the Fr. *pourpris, consecutum*, an inclosure.] Any thing done to the nuisance or hurt of the King's demesnes or the highways, &c. by inclosure or buildings: endeavouring to make that private which ought to be public. *Glanv. l. 9. c. 11: 1 Inst. 38, 272.* See this Dictionary title *Nuisance* I.

Crompton in his *Jurisd.* 152, defines it thus: Pourpresture is properly when a man taketh unto himself, or incroacheth any thing he ought not, whether it be in any jurisdiction, land, or franchise; and generally when any thing is done to the nuisance of the King's tenants. See *Kitchen 10; Manwood's Forest Laws, cap. 10; Glanville, lib. 9. c. 11.*

Skene de verbor. signif. verbo Pourpresture, makes three sorts of this offence; one against the King, a second against the lord of the fee, the third against a neighbour by a neighbour. See *2 Inst. 38 & 272. Et lib. niger inscac. 37 & 38.* That against the King happens by the negligence of the Sheriff or deputy, or by the long continuance of wars, inasmuch as those, who have lands near the crown lands, take or inclose a part of them, and it to their own.

Pourpresture against the lord is, when the tenant neglects to perform what he is bound to do for the chief lord, or in any wise deprives him of his right. *Cowell.*

Pourpresture against a neighbour is of the same nature: It is mentioned in the *Monast. 1 tom. 843; and in Thorn. 2623.*

POUR SEISIR TERRES *le feme que tient en dower, &c.*] An antient writ whereby the king seized the land which the wife of his tenant, who held *in capite*, deceased, had for her dowry if she married without his leave; it was grounded on the statute of the King's prerogative, *cap. 3.* See *F. N. B. 174.* This writ does not now lie. See *stat. 12 Car. 2. c. 24*, abolishing these and other feudal effects of tenures.

POURSUIVANT, from the Fr. *poursuivre*, i. e. *persequi.*] The King's messenger attending him, to be sent on any occasion or message; as for the apprehending of a person accused or suspected of any offence: Those employed in martial causes are called Pursuivants at Arms. See *Herald.*

The rest are used upon other messages in time of peace, and especially in matters touching jurisdiction. *Nicholas Upton* in his book *De militari Officio, lib. 1. c. 11*, mentions the antient form of making these Pursuivants; and tells us, that they were called *milites linguæ*; because their chief honour was in *custodia linguæ*, and he divides them into *cursores equitantes* and *prosecutores*. *Cowell.*

POURVEYANCE, or PURVEYANCE; The providing necessities for the King's house.

The profitable prerogative of *Purveyance* and *Preemption*, was a right enjoyed by the Crown, of buying up provisions and other necessities, by the intervention of the King's Purveyors, for the use of his royal household, at an appraised valuation, in preference to all others, and even without consent of the owner; and also, of forcibly impressing the carriages and horses of the Subject, to do the King's business on the public roads, in the conveyance of timber, baggage, and the like, however inconvenient to the proprietor, upon paying him a settled price.

This prerogative prevailed pretty generally throughout *Europe*, during the scarcity of gold and silver; and the high nominal valuation of money consequential thereupon. In those early times, the King's household (as well as those of inferior lords) was supported by specific renders of corn, and other victuals, from the tenants of the respective demesnes; and there was also a continual market kept at the palace gate to furnish viands for the royal use. 4 *Inst.* 273. And this answered all purposes, in those ages of simplicity, so long as the King's Court continued in any certain place. But when it removed from one part of the kingdom to another, (as was formerly very frequently done,) it was found necessary to send Purveyors beforehand, to get together a sufficient quantity of provisions and other necessities for the household: And, lest the unusual demand should raise them to an exorbitant price, the powers before mentioned were vested in these Purveyors; who, in process of time, greatly abused their authority, and became a great oppression to the Subject, though of little advantage to the Crown; ready money, in open market, (when the Royal residence was more permanent, and specie began to be plenty,) being found upon experience to be the best provider of any. Wherefore, by degrees, the powers of Purveyance have declined, in foreign countries as well as our own; and having fallen into disuse here during the suspension of Monarchy, King *Charles II.* at his Restoration consented, by *stat. 12 Car. 2. c. 24.* to resign entirely these branches of his revenue and power: And the Parliament, in part of recompence, settled on him, his heirs and successors, for ever, the hereditary excise of fifteen pence *per* barrel on all beer and ale sold in the kingdom, and a proportionable sum for certain other liquors. 1 *Comm.* 287.

By this *stat. 12 Car. 2. c. 24.* it is provided, "that no person, by colour of buying or making provision or Purveyance, shall take any thing of any Subject, without the full and free consent of the owner, obtained without menace of force," &c.

Temporary acts have been passed suspending this statute in favour of the King's Royal progresses, *viz.* *Stats. 13 Car. 2. st. 1. c. 8:* 1 *Jac. 2. c. 10;* and in favour of the Navy and Ordnance. *Stat. 13 & 14 C. 2. c. 20.*

POURVEYOR or PURVEYOR, *Provisor*, derived from the Fr. *pourvoir*, i. e. *providere*.] The officer of the King or Queen, or other great Personage, who provided corn and other victual for their house. See *Magna Charta*, c. 22: *stat. 3 Ed. 1. c. 7 & 31. & anno 28. ejusdem. Articuli super charta*, 28 *E. 1. st. 3. c. 2.* and other statutes. The name of Purveyor was so odious in times past, that by *stat. 36 Edw. 3. c. 2.* the heinous name of Purveyor was changed into buyer:

but the office is restrained by *stat. 12 Car. 2. c. 24.* See *ante Poutveyance.*

POW-DIKE. To perversely and maliciously cut down or destroy the Pow-dike, in the fens of *Norfolk* and *Ely* is felony, by *stat. 22 Hen. 8. c. 11.*

POWER.

An Authority which one man gives another to act for him; a term commonly applied to a reservation made in a conveyance for persons to do some certain acts; as to make leases, raise portions, or the like. 2 *Lill. Abr.* 339.

1. *Upon what Estate, and by what Words, a Power shall be raised.*
2. *How a Power shall be expounded and executed.*

1. IN conveyances to an use, a man may direct or model the use, as he pleases, and the *stat. 27 H. 8. c. 10,* executes the possession to the use: therefore he may annex Powers to estates, which cannot be annexed to them by a conveyance at the Common Law. *Co. Litt.* 237. *a.* *Mo.* 610. and therefore, to the limitation of a use for life, he may annex a power to make leases for years, or lives, or to make a jointure to a wife. *Mo.* 381: 2 *Lev.* 58: Or to grant annuities, raise portions, &c. *Mo.* 381: Or to make a jointure, and also a lease to commence after his death, for portions, &c. *Hard.* 413. So, he may annex a power of revocation of all uses limited, and to make a limitation of new uses, and this will not be repugnant. *Co. Litt.* 237. *a.*

So, a power may be annexed to an estate by another deed, executed at the same time, though it be not in the same conveyance by which the estate is conveyed. 1 *Vent.* 279. So, a man may give a Power or authority by will, which is a naked authority, not annexed to an estate: as, if he devises to *A.* for life, and afterwards that it shall be at his disposal to any of his children then living; he hath but an estate for life, with a naked Power to dispose, in the manner directed by the will. 1 *Salk.* 24: 3 *Salk.* 276. So, he may give a power to a stranger, which is a naked collateral Power, and annexed to an estate. Or a Power in gross, which takes effect after his estate is determined. *Hard.* 415.

If a Power be to *A.* or his assigns, to make leases, &c. the Power runs with the estate to the assignee in deed, or in law. 1 *Vent.* 340: 2 *Jon.* 110. So, in all cases a Power coupled with an interest may be assigned: as, a Power to a lessor, and his assigns, to cut down trees. 2 *Mod.* 317.

Powers which are given to mere strangers, that is, to persons who have neither a present nor future estate or interest in the land, are said to be *collateral* to the land; those which are reserved to a person, who has either a present or future estate or interest in the land, are said to be *relating* to the land; and these again are subdivided into two classes, Powers *annexed* to the estate in the land; and Powers *in gross.* Powers *annexed* are, where a person has an estate in the land, and the estate to be created by the Power, is to take effect in possession during the continuance of the estate to which the Power is annexed; such is the power usually given in settlements to tenants for life, when respectively in possession, to make leases. Powers *in gross* are, where the person to whom they are given has an estate in the land; but the estate to be created under or by virtue of the Power, is not to

take its effect till after the determination of the estate to which it relates; such are the Powers usually inserted in settlements, to jointure an after-taken wife. 1 *Inst.* 342, *b. in n.*

If a man, seised in fee, covenant to stand seised to the use of himself for life, with Power to make leases, remainder to another in fee, the Power is not well raised. *Ch. Ca.* 161. If the consideration of the covenant does not extend to the power to make leases. *Mo.* 145: 1 *Co.* 175: *Raym.* 248. So, upon such covenant, he cannot reserve a Power to make leases, jointures, or for preferment of younger children, &c. *Mo.* 381. 383.

Words, which shew the intent of the party, are sufficient to create a Power: as if a Power be to demise or lease, though the intent is, that he declare the uses of the first settlement for life or years; for the lease does not take effect by demise, but by declaration of the uses. *Mo.* 611. So, if a man expresses the Power only by implication, it is well; as, provided, that he shall not have power to alien, &c. otherwise than to make a jointure, and leases for 21 years, it is a good Power to make a jointure and leases. 1 *Leo.* 148. So, if a devise be to *A.* for life, to set, let, and make estates out of it as I might, and afterwards to his daughter in tail; *A.* has power to make leases, it being the custom of the country where the land lies, to let for lives or years. 2 *Rol.* 261. *l.* 35.

But a Power, being executory, may be restrained or enlarged by a subsequent deed: as, if a Power be general, to revoke; by a covenant afterwards, that he will not revoke without the consent of *B.* the Power is restrained. *Jon.* 411. So, if the consideration, upon which the Power was founded, does not extend to the person to whom the lease is made, the lease shall be void: as, if a man covenant, in consideration of natural affection, to stand seised to the use of himself for life, &c. with Power to make leases, &c. a lease to a stranger is void: for he is not within the consideration. 2 *Rol.* 260. *l.* 30. So, if a Power at its creation be, to make leases to a person, to whom the consideration does not extend, it will be void, though the lease be executed to a person within the consideration. 2 *Rol.* 260. *l.* 35.—But a man cannot annex a Power of revocation to a feoffment or grant, for that will be void. 1 *Inst.* 237. *a:* *Mo.* 610.

Powers of revocation of uses of lands are very frequent in merely voluntary conveyances, but have of late been disused in marriage settlements; doubts having arisen whether such settlements are not fraudulent within the *stat.* 27 *Eliz. c.* 4: *T. Jones* 94, 95. Powers of revocation in their creation are to be construed favourably; and therefore no express or technical words are necessary to the creating of such Powers; but any expression which denotes an intent to reserve such Power, will be sufficient. 2 *Vern.* 376: 3 *Keb.* 26. But if such Power be once executed, that is, the old uses over the whole estate revoked, and new uses limited, such new uses cannot be revoked, without an express reservation of a Power for such purpose. *Pre. Ch.* 474: 2 *Burr.* 1136: 2 *Ves.* 211. A Power of revocation may extend to all the limitations, or be restricted to a particular estate, limited by the conveyance; as where the use is to *A.* for life, remainder over, with Power to revoke the estate for life only, this seems to be a good Power. 2 *Rol. Ab.* 262. *pl.* 1. See further, *Fonblanque Treat. Eq. lib.* 2. *c.* 6. § 6, 7. and the notes there.

2. A Power shall be expounded strictly; therefore if a man has Power to make leases generally, this extends to make leases in possession only, and not in reversion. 2 *Roll.* 261. c. 5: *Cro. Jac.* 318: *Yelv.* 222: *Ray.* 248: 1 *Ld. Raym.* 267: 2 *Salk.* 357: 1 *Lev.* 168: 6 *Co.* 33, a: *Mo.* 199: 1 *Leo.* 35: 3 *Leo.* 131. Nor a release to commence *in futuro*. *Raymn.* 248: 1 *Leo.* 35: *Yel.* 222: *Cro. Jac.* 318: *Mo.* 494. So if the power be to make leases for two or three lives, he cannot make a lease to one not *in esse*; as to the son of *B.* not born, &c. *Raym.* 163. So, if the Power be to make leases in possession, he cannot make a lease of land in reversion, though it be to commence *in presenti*. 1 *Sid.* 101: *Ch. Ca.* 18.

So, if part of a lease be in reversion, the whole lease shall be void. 3 *Salk.* 276: 2 *East's Rep.* 376. So, if the Power be to make leases in possession, or in reversion, he cannot make a lease in possession, and another lease of the same land in reversion; but his Power to lease in reversion extends only to make leases of the land, which was not then in possession. 1 *Ld. Raym.* 269: 2 *Salk.* 357. So a Power to make a lease of three lives or three years in possession, or for two lives or thirty years in reversion, warrants only a concurrent lease for two lives; for a lease for lives cannot commence at a future day. 1 *Ld. Raym.* 269: 2 *Salk.* 537.

But if a power be annexed to the estate of him in reversion, to make leases generally, he may make a lease *in presenti* of the reversion. 1 *Lev.* 168. Though the Power be to make leases in possession. *Ch. Ca.* 18: 1 *Lev.* 168: 1 *Sid.* 260, 261. So, if a fine be to the conusee for 15 years, afterwards to *B.* for life, &c. with Power to lease for three lives, or 21 years in possession; he may make a lease during the 15 years of land in lease at the time of the fine, when such lease expires. 2 *Roll.* 260. l. 50: *Cro. Jac.* 347: 1 *Roll.* 12: 2 *Roll.* 216. So if husband and wife lease pursuant to the *stat.* 32 *H.* 8. c. 28; and then, by act of Parliament, the estate is settled to the husband for life, with power to lease for three lives, or 21 years; he may make leases of the reversion during the first lease by the husband and wife. 2 *Roll.* 261. l. 15: 1 *Lev.* 36: *cont. Dyer* 357. a. So, if a Power be to make leases in reversion for three lives, &c. he may lease for three lives, when there is another life *in esse*, though the Power does not say, to make leases of the reversion; for there is no prejudice. 2 *Roll.* 261. l. 30. So, he may make a lease for years determinable upon three lives, to commence after the end of the former lease *in esse*. 8 *Co.* 70. See title *Lease* I. 2.

Whatever is an equitable, ought to be deemed a legal, execution of a Power; and the reason is obvious; for Powers were originally in their nature equitable, but are, by the Statute of Uses, transferred to Common Law. See 2 *Burr.* 1147: 1 *Cowp.* 266.

There is a distinction between the *Non-execution* of a Power, and a *defective* execution of a Power; for though a Court of Equity will, under certain circumstances, help the latter, it will never aid the former; because so to do, would be repugnant to the nature of a Power, which always leaves it to the free will and election of the party to whom the Power is given, to execute it, or not; for which reason Equity will not compel the execution of a Power, or construe the act as done when there is no evidence of the intention of the party to do it. 2 *P. Wms.* 490: and see *Powell on Powers*.—The declaration of such intent, is, however, a sufficient ground for the interference of a Court of Equity. 2 *Vern.* 69. A covenant in a marriage settlement, referring to a

Power, or to the estate on which the Power attaches, is, in respect of the consideration, a sufficient indication of an intent to execute such Power. 2 *Freem.* 256: 2 *Vern.* 379: See 2 *P. Wms.* 222: *Gilb. Rep.* 166: *Ambl.* 3.

The interference of Courts of Equity, in cases of a defective execution of a Power, proceeds upon the same principles as those on which those Courts will supply any defect in the surrender of a copyhold estate, and is therefore bound by the same considerations. *Treat. Eq.* i. 314. n. See this Dictionary, title *Copyhold*.

In *Bath and Montague's Case*, (3 *Ch. Ca.* 69. 93.) it is said, by the two Chief Justices, that if the party appear to have intended to execute his Power, and is prevented by death, Equity shall interpose to effectuate his intent, for it is an impediment by the act of God; and the case of *Smith v. Ashton*, (1 *Ch. Ca.* 264: *Finch Rep.* 273.) is relied on as an authority to such an effect: but this not being an original opinion of the learned Chief Justices, and founded only on the case cited, can be carried no farther than that case warrants; upon reference to the circumstances, it will be found to afford an authority rather against, than in support of the notion, that where a man is only preparing to execute a Power, and dies before he does execute it, the preparatory steps amount to such an execution as Equity will make effectual; for it is observable that the Court, in *Smith v. Ashton*, directed an issue to try whether the notes or instructions for the will, from which the intent of the donee of the Power was inferred, were part of his will; which issue would have been unnecessary, if the Court could have relieved on the ground of preparatory measures only: the relief afforded in that case must therefore be referred to the result of the issue, which was, that the notes or instructions were part of the will, *Treat. Eq.* i. 315. in n.

It is said that Equity will relieve the defective execution of a Power to make leases; but this must be understood of such leases as are not derived under Powers limited in their nature to a particular mode of execution: for in the construction of Powers, originally in their nature legal, Courts of Equity must follow the law, be the consideration ever so meritorious; for instance, in the case of Powers by tenant in tail, to make leases under the statute, if not executed in the requisite form, no consideration, however meritorious, will avail. So, with respect to defective executions of Powers under the Civil-List Act, Powers under particular family entails, Equity can no more relieve from them than it can from defects in a common recovery. The principle upon which the rule of construction is founded, in these cases is, that there is nothing to affect the conscience of the remainder-man. *Cowp.* 267.

In the case of defective execution of Powers, it is not necessary, in order to induce the interference of a Court of Equity, that the consideration should be strictly valuable; but it is sufficient that it be meritorious; *i. e.* founded on some moral obligation. *Tr. Eq.* i. 316. in n.

Though Equity will not, even in favour of creditors, execute a Power which the party himself has omitted to execute; yet, if a Power be executed in favour of a volunteer, though a child, it seems agreed by all the cases, that the money shall be assets for the benefit of creditors, 2 *Vern.* 319: 1 *Atk.* 495: 2 *Ves.* 1. Nor can a Power be so framed as to protect an appointment under it, from payment of the debts of the person appointing. 2 *Ves.* 640. See title *Executor* V. 6.

It is agreed in the Books, that a wife may, without her husband, execute a naked authority, whether given before or after coverture, and though no special words are used to dispense with the disability of coverture; and the rule is the same where both an interest and an authority pass to the wife, if the authority is collateral to, and doth not flow from the interest; because then the two are as unconnected, as if they were vested in different persons. *Finch Rep.* 346. As too, a *feme covert* may without her husband convey lands in execution of a mere Power or authority, so may she with equal effect in performance of a condition where land is vested in her on condition to convey to others. *W. Jones* 137, 8. The reason why in these instances the wife may convey without her husband, seems to be, that he can receive no prejudice from her acts, but a great one might arise to others, if his concurrence should be essential. 1 *Inst.* 112. *a. in n.* See title *Baron and Feme*.

As to the *Suspension* and *Extinction* of Powers, see 1 *Inst.* 342. *b. in n.*; and as to the rules by which the creation and execution of Powers in general are governed; see *Powell on Powers*: and further with respect to subjects connected therewith, this Dictionary, titles *Authority*; *Estate*; *Limitation of Estate*; *Lease*; *Remainder*; *Trust*; *Use*, &c.

POWER OF THE COUNTY; See *Posse Comitatus*.

POWER OF THE CROWN; See title *King*.

POWER OF THE PARENT; See *Parent*.

POYNDING, See *Poinding*.

POYNING'S LAW, An act of Parliament made in *Ireland*, in the reign of *Hen. VII.* so called because sir *Edward Poyning* was Lieutenant there when it was made, whereby all the statutes in *England* were declared of force in *Ireland*; which before that time they were not. 12 *Rep.* 109. See title *Ireland*.

PRACTICE, This term is sometimes applied, in an unfavourable sense, to signify fraud or *bad practice*. Thus clandestine proceedings are said to be *by Practice*.

PRACTICE OF THE COURTS.

By this is understood the form and manner of conducting and carrying on suits or prosecutions at Law or in Equity, civil or criminal, through their various stages, from the commencement of the process to final judgment and execution; according to the principles of Law, and the rules laid down by the several courts.

Though the knowledge of this *Practice* is to be acquired chiefly by experience, it is founded on the original structure and progressive improvements of our Laws. Several modern treatises have been written on the Practice of the several Courts of *King's Bench*, *Common Pleas*, *Chancery*, and *Exchequer*; some of which are by no means liable to the censure passed on former productions of that nature, by the learned and ingenious writer, from whom the following abridgment is extracted. The nature of this Dictionary precludes the possibility of entering into any thing like a general detail on so complicated a subject: the various points of which are incidentally noticed, under the several heads to which they apply.

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have secured to its author a fame more adequate to his deserts, had not the splendour of the *Commentaries* obscured all inferior exertions of ingenuity and elegance. See *Eunomus*, Dial. 2. § 23—40.

It must be owned, (says that writer,) that the knowledge of Practice can be acquired only by Practice: though, as its rules depend on principles, it is as much a science, as any other part of the Law. It is impossible even to recollect those rules, and often difficult to investigate them. The very few books of any credit that have been written on this subject are written on a loose and unconnected plan, and after all, speak only to the learned. This branch of Law is more than any other destitute of any elementary treatise.

But this defect has since been very much supplied by *Crompton's* Book of Practice in the Courts of K. B. and C. P. since enlarged by *Sellon*; *Impey's* Practice in the same courts; *Tidd's* Practice in the Court of K. B. and perhaps others which might be named, if not as of equal merit, yet of considerable utility.

The following idea of Practice, given by the author of *Eunomus*, is new, and it is believed, accurate as far as it goes: it may afford a pleasing view of the *rationale* of Practice, even to adepts; but it is chiefly adapted to the instruction of those who are first setting out in the profession: who, either from lectures in the University, or in their own private studies, have a tolerable notion of the general principles of Law: though they may have barely set foot in *Westminster-Hall*, and consequently have but little idea of the Practice of a Court. It arises on the following case:

A person who has a cause of complaint, either for a right detained, or an injury done, is determined to bring his *Action*: and by his attorney takes out *Process* against the party complained of; in consequence of which, the latter (who is called the defendant) puts in *Bail*: either common or special, as the case requires. The defendant being thus secured, the plaintiff *declares* in proper form the nature of his cause; the defendant answers this declaration; and the charge and defence, by due course of *Pleading*, (in the course of which may be introduced a *Demurrer* on either side,) are brought to one or more plain simple facts: these facts arising out of the pleadings, and thence called *Issues*, come next to *Trial* by a *Jury*; who, having heard the *Evidence* on an issue before them, find (let it be supposed) a *Verdict* for the plaintiff; on which verdict *Judgment* is afterwards entered. The plaintiff's costs of suit are then taxed by the Officer of the Court; and the judgment is put in *Execution*, by levying on the defendant's effects the *Damages* given by the Jury, and the *Costs* allowed by the Court; which being done, there is an end of the suit, and both parties are once more out of Court. [By referring to the titles in this Dictionary, Distinguished by *Italic* words, in the above sentence, further information on each head will be obtained.]

But the Practice of a Court in civil suits arises, in a great measure from the interruption in the above regular stages, and course of a cause. Those regular stages (as to the time and manner of carrying them on) are themselves the legitimate offspring of the established Practice of the Court where the cause is brought: when they are pursued, the course of the Proceeding runs on smooth and silent, transacted by the Attornies in the cause, and the Officers of the Court, without ever being heard of in open Court: and the method of transacting this business is that *Practice*, the knowledge of which

more immediately concerns the Attornies and Officers. The irregularities and informalities, that push a cause out of its course, must be redressed by the interposition of the Court; and it is this kind of business that furnishes and makes up a great part of the visible Practice of the Courts of Law in Term time.

It was above stated, that the Attorney first takes out *process* against the defendant, in order to make him appear. But this *process* may be irregular, and then it will produce *motions to set it aside*; as for instance, where the defendant is a privileged person, it may not only be irregular, but highly oppressive; and then it grounds a *motion for an attachment* against the parties executing the process, as for a constructive *contempt* of the Court. This is a general motion, and may, as the oppression which produces it, arise in any stage of the cause. The *suit* itself, as well as the process, may be irregular, and then it will occasion a *motion to stay proceedings* in a cause: as where the parties have agreed to compromise the matters in difference, and a release is not executed; for the release when executed may be pleaded in bar of the action. The first process may be regular, and the *Bail* may not, and thence arise various motions, either *to discharge the defendant on common bail*, where it appears from the affidavit that he is not liable to give special bail; or where the affidavit to hold to bail is defective.—*To set aside a Judge's order*, made at his chambers, relating to the bail: which kind of motion may be made on other grounds. If the bail is regular in the manner of putting it in, but suspicious as to the competency of the bail, the plaintiff gives notice, and the defendant moves *to justify bail* in open Court.

The *Declaration* may furnish several motions; as to the delivery of it; its frame and structure; or the neglect of it by the defendant. Perhaps it cannot be delivered in the common form, the party absconding to avoid it; and then the plaintiff moves *that some other service* of the declaration may be sufficient. The declaration being delivered, the defendant may apprehend it to be immoderately prolix and impertinent; in which case he will move *to strike out some counts in the declaration*. The Court usually upon this order it to be referred to the Master of the Plea Office, and the Master's report is the ground of the rule afterwards made. *A motion for the Master's Report* is another motion, that may arise in various parts of a cause. In action, that is in its nature transitory, if the declaration lays the cause of action in one county, and it did in reality arise in another, the defendant may avail himself of that circumstance; and upon affidavit apply to the Court for the plaintiff *to change the Venue*, (that is, the place where the cause of action is declared to have happened,) from the first county to the latter. The *venue* may likewise be changed from any county in *England*, wherever the cause of action arose, to that of *Middlesex*, where the Court sits, if the defendant is privileged as attendant on that Court. Where the Jury, and not the *venue*, is to be changed, as where the material evidence arises in the place laid, but no jury, common or special, can be had, disinterested, (as in case of a county cause about a bridge, or the like,) it is usual to move for a trial *in the adjoining county*, upon entering a *suggestion on the roll*. See this Dictionary, titles *Venue*; *Trial*.—A suggestion on the roll is sometimes entered for other purposes; as where the Sheriff who regularly returns the process is partial. See titles *Jury*; *Sheriff*; *Coroner*.

If a declaration is substantially defective, the defendant, instead of answering, *demurs* to it. See title *Demurrer*. If, on the other hand, the declaration is delivered, and is unexceptionable, and the defendant neglects to answer it in due time, the plaintiff has his *judgment by default*; but if the plaintiff is over-hasty in signing this judgment, the Court will interpose on a *motion to set it aside*; in consequence of which, the defendant will be at liberty to plead. The motion to set aside a judgment, obtains, in other instances; and the motion for judgment, *as in case of a nonsuit*, arises on another ground, as will be shewn hereafter; and see title *Nonsuit*.

When the defendant comes to *plead* to the declaration, instead of making, in due time, a plain denial of the charge, called the *General Issue*, he may find it necessary to vary the common course, either by enlarging the time, or the manner of pleading: he may therefore *move for time to plead*, which being a matter of indulgence, the Court, on the equity of the case, may refuse or grant; and grant without or upon terms. At Common Law, a defendant could only plead a single matter; but this is now remedied by statute; (see title *Pleading*;) and, if necessary, the defendant accordingly moves the Court *for leave to plead several matters*, which he mentions. Sometimes this expedient is in after-thought, and then, as it tends to delay the plaintiff, the defendant moves for leave to *withdraw the general issue*, and to be at liberty to *plead specially*; sometimes he moves the contrary.

The plea, replication, rejoinder, &c. are at length settled on record, and come to an issue; which remains to be settled by a Jury; in order to which all the record down to the issue, which it includes, is transcribed from what is called the plea-roll, and which is only part of a large bundle, comprehending the cases of many other persons; and never stirs out of the custody of the Court: That manuscript is called the *Nisi Prius* Roll; as the *Nisi Prius* roll, after it is returned from the trial, assumes the name of the *Postea*. See titles *Pleading*; *Nisi Prius*; *Postea*; *Record*.

Between the issue and the trial, several motions may happen, which may either put off the trial or not; of the latter kind, and at this stage, is a motion by the defendant *for leave to pay money into Court*. See title *Money into Court*.

Many circumstances may make it necessary to postpone a trial, or vary the common forms of examination. The necessary witnesses in the cause may reside altogether abroad, or being there for a time, may not be likely to return at the regular time of the trial: In the first case, the Court is moved for a commission *to examine witnesses on interrogatories*; which are settled here, sent over, and with their answers properly attested, are sent back, and read in evidence at the trial. See title *Depositions*. In the latter case, the trial is delayed on motion, *to put it off for the absence of a material witness*: But if, by this delay, the other party is likely to lose evidence that is ready at the time; either in case a witness is so old and infirm, as not to be likely to survive the arrival of the evidence on the other side; or in case his necessary business obliges him to leave *England* before the trial can come on; in this case, a motion is made by the party affected, to examine such witness *de bene esse*; that is, to admit the depositions, so taken, as evidence, if the person cannot afterwards be examined at the trial: If a witness, under none of these capacities, being duly summoned, neglect to attend, he is liable to an action on

the statute (5 *Eliz. c. 9.*) for damages; or the Court will punish him criminally for the contempt on a *motion for an Attachment*. See title *Evidence* II. 2. Motions may also arise respecting written evidence, as for leave to *inspect and take copies of Corporation books*; or for an order to *produce them at the Trial*.

Not only the Witnesses in a cause, but the Jury, may occasion particular applications to the Court: so may the nature of the cause in question; and so may the course of Judicature itself. The nature of the cause sometimes requires the Jury to see the very spot where the matter in dispute arises; in which case, after issue joined, the Court is moved *for a view*. See titles *Jury I; View*. In cases also where the cause is either of a nature to exceed the apprehension, or to inflame the passions, of a common Jury, a *Special Jury* will be moved for. See title *Jury I*. Sometimes the cause is apparently likely to be very long, intricate, and important, either in its value or its consequences; from whence arises a motion for a *Trial at Bar*. See title *Trial*.

When the cause is brought to the Assises, the Jury sworn, and the Witnesses examined; the trial goes on, or it does not; if it goes on, either a verdict is given, or it is not: if a verdict is given, it is either for the plaintiff or the defendant. The Jury may be sworn, and the Witnesses may be in part examined; and yet the trial may stop; because the parties, may then, or at any time, compromise the matter in difference, or agree to refer it to arbitrators; in either case, a rule is made at the Assises (called an order of *Nisi Prius*;) and motion is afterwards made, to *make the order of Nisi Prius a Rule of Court*. See title *Award VI*.

But the cause may go on, and yet not get to a verdict; for if the plaintiff does not prove his case, the defendant calls no evidence; and, instead of a verdict on either side, there is a *Nonsuit*. Wherever a verdict is given, the plaintiff at least must give evidence to maintain his declaration. Where evidence is produced on both sides, the verdict is given for the plaintiff or defendant, according to the superior weight of evidence. See title *Jury III*.

Here closes the trial; and from this period it is that the record assumes the name of the *Postea*; and if the trial is decisive, neither the Law nor the fact being afterwards controverted, the *postea* is delivered by the proper officer to the Attorney of the victorious party to sign his judgment: but in many cases, after a verdict given, there is room to question its validity; in which case, the *postea* remains in the custody of the Court. The *verdict* may be exceptionable, either from misdirection of a Judge in point of Law, or the misbehaviour of the Jury; in which case, a motion may be made to *set it aside*: as it may on other grounds; as from its being clearly contrary to evidence, or in the damages given greatly exceeding the injury sustained; on both which accounts, a *new trial* may be moved for. See title *Trial*. If the verdict itself stands unimpeached, yet some original defect may appear on the face of the record, which shews that no verdict ought to have been given; or though given, no judgment can be had on it; and when this happens, the motion is in *Arrest of Judgment*. See title *Judgment III*.

Supposing the verdict and record to stand clear of all objections, the judgment follows of course; and after judgment, *Execution*; the purpose of which execution is, to levy the damages assessed by the

Jury, and the costs allowed by the Court. The execution however may for a short time be interrupted, in case any objection arises to the taxation of costs; and then a motion may be made, *for the Master to review his taxation*: this, and every act of the Master, being liable to be reviewed on appeal to the Court; though in judging of ordinary stages of practice, he is invested with original, and competent jurisdiction. If the *Sheriff*, or his Officers, misbehave in respect to the execution, (as in any other service of a writ,) this may produce a *motion for an Attachment* against them.

When execution is over, the cause is over: but a cause may, on many occasions, come much sooner to an end, and in a direction very different from what has been mentioned; it may come sooner to a trial, or it may come to execution without a trial.

In the case put at setting out, and, in the general exposition of the case, it has been supposed that the defendant pleaded to the declaration: but it was intimated, that if he neglected to plead, judgment would be had against him by default; in consequence of this default of a plea, the truth of the fact is confessed, and cannot be afterwards litigated, as on a trial; but this judgment, though it operates so as to preclude the defendant from controverting the fact, which is the cause of action, does not go to a confession of the damages laid in the declaration; which must be ascertained on a *Writ of Inquiry*. See title *Judgment I.*—In this course of proceeding, motions may arise *to set aside the judgment*, and *writ of Inquiry* issued thereon, as irregular;—*to execute a writ of Inquiry before a Judge*, instead of a Sheriff, where it is a matter of importance;—and sometimes *for a new writ of Inquiry*, for excessive damages, in the same manner as for a new trial on those grounds. See title *Trial*.

There are two cases however, where the admission of the defendant silences all future inquiry, either as to the truth of the fact, or the quantity of the damages; that of a direct confession of the action; and a warrant of attorney to confess a judgment: this latter occasions a motion very often; for where it is above a year standing, motion must be made *for leave to file the Warrant of Attorney*, on affidavit of the defendant being still alive, and the debt unpaid: And motions may be made *to set aside the Warrant of Attorney*, if not regularly executed. See title *Judgments acknowledged for Debts*.

A matter may come sooner to a trial, by means of an *Issue directed* by the Court; which obtains, in a Court of Law, principally where a question of civil right is involved in a criminal prosecution for a misdemeanor; in which case, it is the usual lenity of the Court, to suspend the latter till the former has been tried: Or where a Court of Equity directs facts to be inquired of at Law, and does not rest the case on depositions. See title *Feigned Issue*.

What has been said relates merely to the Practice of the Courts in *civil Suits*: and, in general, concerns the trial of a cause. To give a full or general idea of Practice, it may be necessary to establish a distinction between such motions, as are in their nature *previous* to the trial itself, or *subsequent* to it: Of the former sort, are motions to stay proceedings in a cause; motions relating to bail; to declarations; to the time and manner of pleading; for changing *venues*; Special Juries; and many others above particularized: Of the latter sort necessarily, are motions; to set aside verdicts; for new trials; in arrest of judgment; on writs of inquiry; and others, that are easily classed

according to this division. There are some motions that in the abstract are of an ambiguous nature, and may arise in any part of the cause, either before or after a trial; as, *Motions for an Attachment; for a Master's report; and others.*

Every motion hitherto has been supposed to have some relation to the trial of a cause: there are some few entirely independent of it; as a *Motion for a Prohibition*; applications for summary relief, under various statutes, relating to articles of Clerks; to Attornies; Insolvent debtors; and others of that stamp. See further title *Motion in Court.*

Part of the visible Practice of the Court also arises from *Cases directed out of Chancery; Special Verdicts and Writs of Error*; all of which are argued at the bar, and determined by the Judges.

The Practice of *Courts of Equity* may be deduced in a manner similar to the above, by attending to the several stages, from the filing of the bill to the execution of the decree. See title *Chancery.*

The *Crown Business, or Criminal Practice*, of which the Court of K. B. has exclusive jurisdiction, does not admit of the application of the same idea: much the greatest part of it is independent of any solemn trial; and the trials themselves are too simple to endure much interruption, or branch out into many points of Practice. This Crown Practice may be divided into such matters as originally commence in that Court; and such as are removed into it, from other inferior jurisdictions: Of both which kinds, taken together, are, motions for an *Habeas Corpus; Mandamus*; (though this and the motion for a *Quo Warranto*, in cases relating to Corporations, partake also of a civil as well as a criminal nature;) to exhibit *Articles of the Peace*; motions relating to the discharge of *Recognizances*; to remove *Indictments*, orders of *Sessions, Convictions*, made by Justices, &c. from their common ordinary course of proceeding, by writ of *Certiorari*, into this Court, on some foundation of complaint against them. The visible Practice, that occasions this removal, and that arises from it, may be resolved into these few motions, very simple in their kind, though infinitely diversified as to their objects, *viz.* The general *Motion to remove* the indictment, order or conviction by *Certiorari*; *Motion to quash* the indictment, &c. when it is removed. In the case of an indictment, removed, either on a *demurrer*, it is set down to be argued; or motion is made to quash it before trial; or *Motion in Arrest of Judgment*; or *Motion for Judgment* after the trial.

But the most extensive Jurisdiction is involved in matters of original cognisance, whether it regards indictments or informations; or such matters as are entirely independent of either, or any solemn trial; such as begin and end on motions.

There is little or no difference between an indictment commenced in this Court, or removed from another jurisdiction, as to motions concerning them. As to *Informations*, though altogether the Creature of this Court, they admit but of three motions; *the application to the Court to grant it*: when granted, and tried, a casual motion, *in arrest of Judgment*, on grounds arising from the record itself: or, where the charge, in the information and the verdict are both incontestable, the *motion for judgment.*

To recapitulate all in a few words:—Practice in general, it appears, is either in civil or Crown causes. In civil causes, it is either independent of a trial, or relative to it: if relative to it, it arises from

something applied for either before or after a trial. In Crown causes, the only distinction made was, either as it concerned the original jurisdiction of the Court, or such as is exercised, as it were, on appeal. "And unless (concludes the Writer, from whom the foregoing sketch has been extracted and abridged) I was to read over to you a hundred (he might have added *or more*) rules of Court, and the several cases and books on this subject, (which, by the bye, I would not wish any enemy I have to do,) I cannot undertake to be more explicit on this subject."

PRÆCEPTORIES, *Præceptoria*.] A kind of benefices, having their name from being possessed by the more eminent *Templars*, whom the Chief Master by his authority created and called *Præceptores Templi*. And of these *Præceptories* there are recorded sixteen, as belonging to the *Templars* in England, viz. *Cressing Temple, Balshal, Shingay, Newland, Yeveley, Witham, Templebruere, Willington, Rothley, Ovenington, Temple Combe, Trebigh, Ribstane, Mount St. John, Temple Nusum, and Temple Hurst, Mon. Angl. ii. 543*. But some authors say, these places were cells only, subordinate to their principal mansion in the *Temple* in London. See *stat. antiq. 32 Hen. 8. c. 24*.

PRÆCIPE; See title *original*.

PRÆCIPE IN CAPITE, The writ of right for the King's immediate tenants *in capite*, when they are deforced of lands or tenements. *3 Comm. c. 10. p. 195*. See title *Writ of Right*.

PRÆCIPE QUOD REDDAT; See titles *Fine of Lands; Recovery*.

PRÆCIPITIUM, A punishment inflicted on criminals, by casting them from some high place. *Matms. lib. 5. p. 155*.

PRÆFECTUS VILLÆ, Is the same as *præpositus villæ*, i. e. the Mayor of a town. *Leg. Ed. Confess. c. 28*.

PRÆFINE, That fine, which on suing out the writ of covenant, on levying fines, is paid before the fine is passed. See title *Fine of Lands*.

PRÆMUNIRE.

CORRUPTED from, or apparently synonymous with, *Præmoneri*, "to be forewarned;" and therefore, according to the proverb, *fore-armed*: see *Du Cange in v.*] The writ so called, or the offence whereon the writ is granted; the one may be understood by the other. The offence is of a nature highly criminal, though not capital, and more immediately affecting the King or his Government. It is named, from the words of the writ, preparatory to the prosecution thereof, "*Præmunire facias A. B.*—Cause *A. B.* to be forewarned—that he appear before us to answer the contempt wherewith he stands charged;" which contempt is particularly recited in the preamble to the writ. It took its original from the exorbitant power claimed and exercised in *England* by the Pope; and was originally ranked as an offence immediately against the King; because it consisted in introducing a foreign power into this land, and creating *imperium in imperio*, by paying that obedience to papal process, which constitutionally belonged to the King alone, long before the Reformation in the reign of *Henry VIII*. See *4 Comm. c. 8*.

The church of *Rome*, under pretence of her supremacy, and the dignity of *St. Peter's* chair, took on her to bestow most of the ecclesiastical livings, of any worth in *England*, by mandates, before they were void; pretending therein great care to see the Church pro-

vided of a successor before it needed. Whence these mandates or bulls were called *gratie expectativæ* or *provisiones*, whereof see a learned discourse in *Duarenus de Beneficiis*, lib. 3. c. 1.—These provisions were so common, that at last it was necessary to restrain them by the Laws of the Land.

In the 35th year of *Edw. I.* was made the first statute against papal provisions, *stat. 35 E. 1. st. 1*; being, according to *Coke*, the foundation of all the subsequent statutes of *Præmunire*. It recites, that the abbots, priors, and governors, had, at their own pleasure, set divers impositions upon the monasteries and houses in their subjection; to remedy which, it was enacted, that in future, religious persons should send nothing to their superiors beyond the sea; and that no imposition whatever should be taxed by priors-aliens. By *stat. 25 E. 3. st. 5. c. 22*. it was enacted, that if any one purchased a provision of an abbey or priory, he should be out of the King's protection. And by *stat. 25 E. 3. st. 6. (c. 2.)*: *27 E. 3. st. 1. c. 1*: *38 E. 3. st. 1. c. 4*; and *stat. 2. cc. 1, 2, 3, 4*. it was enacted, that the Court of *Rome* should not present or collate to any Bishopric or living in *England*: and that whoever disturbed any patron in the presentation to a living, by virtue of a papal provision, such person should pay fine and ransom to the King, at his will; and be imprisoned till he renounced such provision. The same punishment was inflicted on such as should cite the King, or any of his subjects, to answer in the Court of *Rome*. By *stats. 3 R. 2. c. 3*: *7 R. 2. c. 12*. it was enacted, that no alien should be capable of letting his benefice to farm; in order to compel such as had crept in, at least to reside on their preferments: and that no alien should be capable of being presented to any ecclesiastical preferment, under the penalty of the statutes of Provisors. By *stat. 12 R. 2. c. 15*, all liegemen of the King, accepting of a living by any foreign provision, were put out of the King's protection, and the benefice made void; to which *stat. 13 R. 2. st. 2. c. 2*. adds banishment and forfeiture of lands and goods; and by *c. 3*. of the same statute, it was enacted, that any person bringing over any citation or excommunication from beyond sea, on account of the execution of the foregoing statutes of Provisors, should be imprisoned, forfeit his lands and goods, and moreover suffer pain of life and member.

In the writ for the execution of these statutes, the words *Præmunire facias* being used to command a citation from the party, have denominated in common speech, *not only the writ, but the offence itself*, of maintaining the papal power by the name of *Præmunire*. The *stat. 16 R. 2. c. 5*. which is the statute generally referred to by all subsequent statutes, is, accordingly, usually called *the statute of Præmunire*. It enacts, that whoever procures at *Rome* or *elsewhere*, any translations, processes, excommunications, bulls, instruments, or other things, which touch the King, against him, his Crown and Realm, and all persons aiding and assisting therein, shall be put out of the King's protection; their lands and goods forfeited to the King's use; and they shall be attached by their bodies to answer to the King and his Council; or process of *Præmunire facias* shall be made out against them as in other cases of Provisors. By *stat. 2 H. 4. c. 3*. all persons who accept any provision from the Pope, to be exempt from canonical obedience to their proper Ordinary, were also subjected to the penalties of *Præmunire*. This is said to be the last antient statute concerning this offence till the Reformation.

But by *stat. 2 Hen. 4. c. 4.* whoever shall put in execution bulls purchased by those of the order of *Cîteaux*, to be discharged of tithes, shall incur the like penalty: they were also further restrained by *stats. 6 Hen. 4. c. 1; 7 Hen. 4. c. 8; 9 Hen. 4. c. 8:* and *3 Hen. 5. cap. 4;* by which, the statutes above mentioned are enforced and explained: And by *stat. 23 Hen. 8. c. 2. § 22.* whoever shall sue for or execute any licence, dispensation, or faculty from the see of *Rome:* and by *stat. 28 Hen. 8. c. 16.* (by which all bulls, briefs, &c. obtained from *Rome*, are made void,) whoever shall use, allege, or plead the same in any Court, unless they were confirmed by this statute, or afterwards by the King, shall incur the like penalty. *Vide Reg. 54: 3 Inst. 127.*

The penalties of *Præmunire* have been since applied to other offences, some of which bear more, some less, and some no relation to this original offence, as shall be hereafter noticed.

Whenever it is said, that a person, by any act, incurs a *Præmunire*, it is meant to express, that he thereby incurs the penalties which, by the different statutes above mentioned, are inflicted for the offences therein described. See *4 Comm. c. 8.: 1 Inst. 391. in n. 2.*

Prosecutions on a *Præmunire*, it is remarkable, are unheard of in our Courts: there is only one instance of such a Prosecution in the State Trials: in which case, the penalties of a *Præmunire* were inflicted upon some persons, for refusing to take the Oath of Allegiance (see *post*, I.) in the reign of King *Charles II.* *Harg. St. Tr. ii. 263.*

Having said thus much generally, we may proceed further to consider the subject under the following heads:

I. *What Offences, besides those already specified, come under the Notion of a Præmunire.*

II. *Of the Punishment in a Præmunire.*

I. At the time of the Reformation, the penalties of *Præmunire* were extended to more papal abuses than before; as the kingdom then entirely renounced the authority of the see of *Rome*, though not all the doctrines of the *Roman Church*. And therefore, by the several statutes *24 Hen. 8. c. 12.: 25 Hen. 8. cc. 19, 21.* to appeal to *Rome* from any of the King's Courts, which (though illegal before) had at times been connived at; to sue to *Rome* for any licence or dispensation; or to obey any process from thence; are made liable to the pains of *Præmunire*. And, in order to restore to the King, in effect, the nomination of vacant bishoprics, and yet keep up the established forms, it is enacted by *stat. 25 Hen. 8. c. 20.* that if the Dean and Chapter refuse to elect the person named by the King, or any Archbishop or Bishop to confirm or consecrate him, they shall fall within the penalties of the statutes of *Præmunire*.

Exercising the jurisdiction of a Suffragan, without the appointment of the Bishop of the diocese, is also made a *Præmunire:* by *stat. 26 H. 8. c. 14.;* which sets forth at large how Suffragans are to be nominated, &c. See title *Bishops*.

Also by *stat. 5 Eliz. c. 1.* to refuse the Oath of Supremacy will incur the pains of *Præmunire*; and to defend the Pope's jurisdiction in this realm, is a *Præmunire* for the first offence, and High Treason for the second. So too, by *stat. 13 Eliz. c. 2.* any person importing any *Agnus Dei*, crosses, beads, or other superstitious things pretended to be hallowed by the Bishop of *Rome*, and tendering the same to be used; or

receiving the same with such intent, and not discovering the offender; or a Justice of the Peace, who, knowing thereof, shall not within 14 days declare it to a Privy Councillor; all incur a *Præmunire*. Lastly, to contribute to the maintenance of a Jesuit's college, or any popish seminary whatever, beyond sea; or any person in the same; or to contribute to the maintenance of any jesuit or popish priest in *England*, is by *stat. 27 Eliz. c. 2.* made liable to the penalties of *Præmunire*.

Thus far the penalties of *Præmunire* seem to have kept within the proper bounds of their original institution,—the depressing the power of the Pope: but they being pains of no inconsiderable consequence, it has been thought fit to apply the same, as already hinted, to other heinous offences.

Derogating from the King's Common Law Courts, is said to have been an high offence at Common Law, and is made a *Præmunire* by many antient statutes; for, by the *stat. 27 Ed. 3. c. 1.* of Provisors, If any Subject draw any out of the realm in plea, whereof the cognizance pertains to the King's Court, or of things whereof judgments be given in the King's Courts, or sue in any other Court to defeat or impeach the judgments given in the King's Courts, he shall be warned to appear, &c. in proper person, at a day, containing the space of two months, at which if he appear not, he and his proctors, &c. shall be put out of the King's protection, his lands and chattels forfeited, his body imprisoned, and ransomed at the King's will, &c. See also *stat. 16 R. 2. c. 5.*

In the construction of these statutes, it hath been held, that certain Commissioners of Sewers, for summoning one before them who had got a judgment at law, and imprisoning him till he would release it, were guilty of a *Præmunire*. 2 *Bulst.* 299: 3 *Inst.* 125: *Cro. Jac.* 336.

Also suits in the Admiralty or Ecclesiastical Courts within the Realm for matters which, upon the face of the libel itself, appear to belong only to the cognizance of the temporal Courts, are said to be within *stat. 16 Rich. 2.* by force of the words, "or elsewhere." 1 *Hawk. P. C. c. 19.* § 14—19.

And it hath been formerly holden, that even suits in a Court of Equity, to relieve against a judgment at Law, were within the danger of these statutes; especially if they tended to controvert the very point determined at Law, or to relieve in a matter relievable at Law. 4 *New Abr.* 140.

By *stat. 1 & 2 P. & M. c. 8.* § 40, to molest the possessors of abbey lands, granted by Parliament to *Hen. VIII* and *Edw. VI.* is a *Præmunire*.—So likewise is the offence of acting as a broker or agent in any usurious contract, where above 10 *per cent.* interest is taken; by *stat. 13 Eliz. c. 8.*—To obtain any stay of proceedings, other than by arrest of judgment or writ of error, in any suit for a monopoly, is likewise a *Præmunire*; by *stat. 21 Jac. 1. c. 3.* § 4.—To obtain an exclusive patent for the sole making or importation of gunpowder or arms, or to hinder others from importing them, is also a *Præmunire* by two statutes: the one, *stat. 16 Car. 1. c. 21.* the other, *stat. 1 Jac. 2. c. 8.*—On the abolition, by *stat. 12 Car. 2. c. 24.* of purveyance, and the prerogative of pre-emption, or taking any victual, beasts, or goods for the King's use, at a stated price, without consent of the proprietor, the exertion of any such power for the future was declared to incur the penalties of *Præmunire*. See title *Purveyance*.—To assert, ma-

liciously and advisedly, by speaking or writing, that both or either House of Parliament have a legislative authority without the King, is declared a *Præmunire* by *stat. 13 Car. 2. stat. 1. c. 1.*—So, to conspire to avoid the seizure or forfeiture, upon the importation of cattle, as mentioned in *stat. 20 Car. 2. c. 7.*—By the *Habeas Corpus* Act also, *stat. 31 Car. 2. c. 2.* it is a *Præmunire*, and incapable of the King's pardon, besides other heavy penalties, to send any subject of this realm a prisoner into parts beyond the seas. See title *Habeas Corpus*.—By *stat. 1 W. & M. st. 1. c. 8.* persons of eighteen years of age, refusing to take the new Oaths of Allegiance, (and formerly of Supremacy, see title *Nonjurors; Oaths*), upon tender by the proper magistrate, are subject to the penalties of a *Præmunire*; and, by *stat. 7 & 8 W. 3. c. 4.* Serjeants, Counsellors, Proctors, Attornies, and all Officers of Courts, practising without having taken the Oaths of Allegiance, (and formerly of Supremacy, and subscribed the declaration against Popery,) are guilty of a *Præmunire*, whether the oaths be tendered or not. See title *Oaths*.—By *stat. 6 Ann. c. 7.* to assert maliciously and directly, by preaching, teaching, or advised speaking, that the then pretended Prince of Wales, or any person other than according to the Acts of Settlement and Union, hath any right to the throne of these kingdoms; or that the King and Parliament cannot make laws to limit the descent of the Crown; such preaching, teaching, or advised speaking, is a *Præmunire*: as writing, printing, or publishing the same doctrines amount to High Treason.—By *stat. 6 Ann. c. 23.* if the Assembly of Peers of Scotland, convened to elect their sixteen representatives in the British Parliament, shall presume to treat of any other matter, save only the election, they incur the penalties of a *Præmunire*.—The *stat. 6 Geo. 1. c. 18.* (enacted in the year after the infamous South Sea project had beggared half the nation,) makes all unwarrantable undertakings by unlawful subscriptions, then commonly known by the name of Bubbles, subject to the penalties of a *Præmunire*: with power to the Court to moderate the judgment.—The *stat. 12 Geo. 3. c. 11.* subjects to the penalties of the statute of *Præmunire* all such as knowingly and willingly solemnize, assist, or are present at, any forbidden marriage, of such of the descendants of the body of King George II. as are by that act prohibited to contract matrimony without the consent of the Crown. See titles *Marriage; King*.

II. THE punishment of this offence may be learned from the foregoing statutes, which are thus shortly summed up by *Coke*: "That from the conviction, the defendant shall be out of the King's protection, and his lands and tenements, goods and chattels, forfeited to the King; and that his body shall remain in prison at the King's pleasure; 1 *Inst.* 129; or (as other authorities have it) during life;" 1 *Bulst.* 199: both which amount to the same thing; as the King, by his prerogative, may any time remit the whole, or any part of the punishment, 2 *Bulst.* 299; except in the case of transgressing the statute of *Habeas Corpus*. These forfeitures, here inflicted, do not (by the way) bring this offence within the general definition of felony; being inflicted by particular statutes, and not by the Common Law. But so odious, Sir *Edw. Coke* adds, was this offence of *Præmunire*, that a man who was attainted of the same, might have been slain by any other man, without danger of Law: because it was provided by *stat.*

25 *Edw. 3. st. 6. c. 22.* that any man might do to him as to the King's enemy; and any man may lawfully kill an enemy. However, the position itself, that it is at any time lawful to kill an enemy, is by no means tenable: it is only lawful by the law of nature and nations, to kill him in the heat of battle, or for necessary self-defence. And to obviate such savage and mistaken notions, the *stat. 5 Eliz. c. 1.* provides, that it shall not be lawful to kill any person attainted in a *Præmunire*; any law, statute, opinion, or exposition of Law to the contrary notwithstanding. But still such delinquent, though protected, as a part of the public, from public wrongs, can bring no action for any private injury, how atrocious soever; being so far out of the protection of the Law, that it will not guard his civil rights, nor remedy any grievance which he, as an individual, may suffer. 1 *Inst.* 130. And no man, knowing him to be guilty, can with safety give him comfort, aid, or relief. 1 *Hawk. P. C. c. 19.* See 4 *Comm. c. 8.*

If the defendant be condemned on his default of not appearing, whether at the suit of the King or party, the same judgment shall be given as to the being out of the King's protection and the forfeiture; but instead of the clause, that the body shall remain in prison, there shall be awarded a *capiatur.* *Co. Litt.* 129. *b.* 3 *Inst.* 125. 218.

A statute by appointing that an offender shall incur the penalty and danger mentioned in *stat. 16 Ric. 2. c. 5.* does not confine the prosecution for the offence to the particular process thereby given. 1 *Vent.* 173.

It is holden that the statute of *Præmunire*, which gives a general forfeiture of all the lands and tenements of the offender, extends not to lands in tail. *Co. Litt.* 130.

It is said, the statute of *Præmunire* doth not extend to the forfeiture of rents, annuities, fairs, &c. or any other hereditaments that are not within the word *terræ.* 3 *Inst.* 126.

This suit need not be by original in *B. R.* for if defendant be *in custodiâ Mareschalli*, the suit may be against him by bill; and defendants cannot be sued in any other Court when they are *in custodiâ Mareschal'*. And if a defendant come not at the day, &c. or if he appears and pleads, and the issue be found against him, or he demurs in law, &c. judgment shall be given, that he shall be out of protection, &c. 3 *Inst.* 124.

Tenant in tail is attainted in a *Præmunire*, he shall forfeit his lands only during life; and afterwards the issue in tail shall inherit. 11 *Rep.* 56.

A person, being seised in fee of lands, was indicted for a *Præmunire* upon *stat. 13 Eliz. c. 2.* but before conviction he made an entail of his lands; and it was adjudged, that the attainder should relate to the time of the offence, and that was before he entailed the lands, and not the time of the judgment which was afterwards; and the freehold being in him at the time of the attainder, shall not be divested without an inquisition under the Great Seal. *Cro. Car.* 123, 172.

It hath been adjudged, that a pardon of all misprisions, trespasses, offences, and contempts, will pardon a *Præmunire* *Cro. Jac.* 336; 2 *Bulst.* 299.

The defendant in a *Præmunire* must regularly appear in person, whether he be a Peer or Commoner, unless he is dispensed with by some writ or grant for that purpose; but in the case of Sir *Anthony Mildmay*, he was allowed to plead a pardon to a *Præmunire* by Attor-

ney; but it has been thought, that there was some clause to this effect in the pardon. 3 *Inst.* 125: 1 *Roll. Rep.* 190: 2 *Bulst.* 290.

On an indictment of a *Præmunire*, a Peer of the Realm shall not be tried by his Peers. 12 *Co.* 92.

On an information on the *stat.* 6 *Geo.* 1. c. 18. for setting up a bubble called the *South Sea*, it was determined that the Court was not obliged by that act to give the whole judgment, as in case of a *Præmunire* against a defendant, but only such parts of it as in their discretions they should think fit; and accordingly a fine of 5*l.* was set on the party convicted, and judgment that he should remain in prison during the King's pleasure. 2 *Ld. Raym.* 361.

PRÆPOSITUS ECCLESIAE. A Church reeve, or *Churchwarden*; See that title.

PRÆPOSITUS VILLÆ. Sometimes is used for the constable of a town, or petit constable. *Cromp. Jurisd.* 205. Yet the same author, 194, seems to apply it otherwise; for there *quatuor homines præpositi* are those four men, who must appear for every town, before the justices of the forest in their circuit. It is sometimes used for an head or chief Officer of the King, in a town, manor, or village, or a reeve. See *Reeve. Animalia & res inventæ coram ipso (præposito) & sacerdote ducenda erant. LL. Edw. Confessor. cap. 28.* This *Præpositus Villæ*, in our old records, does not answer to our present constable, or headborough of a town; but was no more than the reeve, or bailiff, of the Lord of the Manor, sometimes called *Serviens Villæ*.

By the Laws of *Henry I.* the Lord answered for the town where he was resident; where he was not, his dapifer, or seneschal, if he were a Baron: but if neither of them could be present, then *Præpositus & quatuor de unaquâque villa*, i. e. the reeve and four of the most substantial inhabitants were summoned. See *Brady's Glossary to Introduction to English History*, page 57. in voc. *Præpositus*.

PRÆROGATIVE; See *Prerogative*.

PRAYER; See *Service and Sacraments*.

PRAYERS OF THE CHURCH; See *Common Prayer*.

PREACHING, Every beneficed Preacher, residing on his benefice, and having no lawful impediment, shall in his own cure, or some neighbouring church, preach one sermon every *Sunday* of the year. And if any beneficed person be not allowed to be a Preacher, he shall procure sermons to be preached in his cure by licenced Preachers; and every *Sunday*, whereon there shall not be a sermon, he or his curate is to read one of the homilies: No person, not examined and approved by the Bishop, or not licenced to preach, shall expound the Scripture, &c.; nor shall any be permitted to preach in any church, but such as appear to be authorized thereto, by shewing their licence; and Churchwardens are to note in a book the names of all strange clergymen who preach in their parish; to which book every Preacher is to subscribe his name, the day he preached, and the name of the Bishop of whom he had licence to preach. *Can.* 44, 45. 49.

If any parson licenced to preach, refuses to conform to the Ecclesiastical laws, after admonition, the licence of every such Preacher shall be void: And if any parson preach doctrine contrary to the word of God, or the Articles of Religion, notice is to be given of it to the Bishop by the Churchwardens, &c. So likewise of matters of contention and impugning the doctrine of other preachers in the same Church; in which case, the Preacher is not to be suffered to preach,

except he faithfully promise to forbear all such matter of contention in the Church, until the Bishop hath taken further order therein. *Can.* 53, 54.

No minister shall preach or administer the sacrament in any private house, unless in times of necessity, as in case of sickness, &c. on pain of suspension for the first offence, and excommunication for the second; which last punishment is also inflicted on such Ministers as meet in private houses, to consult on any matter tending to impeach the doctrine of the Church of *England*. *Can.* 71, &c.

PREAMBLE, *Premium*, from the preposition *præ*, before, and *ambulo*, to walk.] The beginning of a statute is called the Preamble; which is a key to the intent of the makers of the act, and the mischiefs which they would remedy by the same. See title *Statute*.

PRE-AUDIENCE, In the Courts, is of considerable consequence; the following short table of precedence, which usually obtains among the practisers, is taken from 3 *Comm. c.* 3. *p.* 97. *in n.*

1. The King's *premier* Serjeant; (so constituted by special patent.)

2. The King's *antient* Serjeant, or the eldest among the King's Serjeants.

3. The King's Advocate-General.

4. The King's Attorney-General.

5. The King's Solicitor-General.

6. The King's Serjeants.

7. The King's Counsel, with the Queen's Attorney and Solicitor, and those who have patents of precedence. See title *Barrister*.

8. Serjeants at Law.

9. The Recorder of *London*.

10. Advocates of the Civil Law.

11. Barristers.

In the Court of Exchequer, two of the most experienced Barristers, called the Post-man and the Tub-man, (from the places in which they sit,) have also a precedence in motions. See title *Motion in Court*.

PREBEND, *Prebenda*.] The portion which every Prebendary of a Cathedral Church receives, *in right of his place*, as one of the *Chapter* of the Dean, for his maintenance; as *canonica portio* is properly used for that share, which every canon receiveth yearly out of the common stock of the Church. And *Præbenda* is a several benefice arising from some temporal land, or some Church appropriated towards the maintenance of a Clerk, or Member of a Collegiate Church; and is commonly named of the place where the profit arises.

Prebenda, strictly taken, is that maintenance which daily *præbetur* to another; but now it signifies the profits belonging to the Church, divided into those portions called *Præbenda*, and is a right of receiving the profits for the duty performed in the Church sufficient for the support of the Parson in that divine office where he resides. *Decret.* title *De Præbend.*

The Spirituality and Temporality make a Prebend, but the Spirituality is the highest and most worthy: and a person is not a complete Prebendary, to make any grant, &c. before installation and induction. *Dyer* 221.

Præbends are simple and dignitary.

A simple *Prebend* hath no more than the revenue for its support; but a *Prebend* with dignity hath always a *jurisdiction annexed*; and for this reason the *Prebendary* is stiled a *dignitary*, and *his jurisdiction is gained by prescription*.

Prebends are some of them donative; and some are in the gift of laymen; but in such case they must present the *Prebendary* to the Bishop, and the Dean and Chapter inducts him, and *places him in a Stall* in the Cathedral Church, and then he is said to have *locum in choro*: At *Westminster*, the King collates by patent, and, by virtue thereof, the *Prebendary* takes possession without institution or induction. 2 *Rol. Abr.* 356.

As a *Prebend* is a benefice without cure, &c. a *Prebend* and a parochial benefice are not incompatible promotions; for *one man may have both without any avoidance of the first*: For though *Prebendaries* are such as have *no cure of souls*, yet there is a *sacred charge* incumbent on them in those Cathedrals where they are resident, and they are obliged to preach by the canons of the Church; and it is not lawful for a *Prebendary* to possess two *Prebends* in one and the same Collegiate Church. *Rol. Abr.* 361.

Prebendaries are said to have an estate in fee-simple in right of their Churches, as well as Bishops of their Bishoprics, Deans of their Deaneries, &c.

Corpus Præbendæ, is that which is received by a *Prebendary* above the profits which are always for his daily maintenance. See further titles *Chapter*; *Clergy*; *Dean*.

PRÆBENDA and PROBANDA were also in old deeds used for provisions, provand or provender. *Pro equo suo unum bushel avenarum pro Præbenda capienda*. *Coucher Book in Dutchy Office*, i. 45; *Cowell*.

PREBENDARY, *Prebendarius*.] He who hath a *prebend*; so called, not a *præbenda auxilium & consilium episcopo*, &c. but from receiving the *prebend*: And if a manor be the body of a *prebend*, and is evicted by title paramount; yet the *Prebend* is not destroyed. 3 *Rep.* 75.

There is a *golden Prebendary of Hereford*, otherwise termed *Prebendarius Episcopi*, who is one of the twenty-eight minor *Prebendaries* there, and has, *ex officio*, the first canon's place that falls: he was antiently *confessarius* of the Cathedral Church, and to the Bishop, and had the offerings at the altar; whereby, in respect of the gold commonly given there, he had the name of *Golden Prebendary*. *Blount*.

PRECARIÆ, Days-works, which tenants of some manors were bound, by reason of their tenure, to do for their lord in harvest; and, in divers places, are still vulgarly called *Bind days*, for *biden-days*, which, in the *Saxon*, *dies Precarias sonat*: For *bidden* is to pray or intreat. This custom is plainly set forth in the great book of the *Customs of the Monastery of Battel*, title *Apphelderham*, fol. 60. *Cowell*.

PRECEDENCE. The Commonalty of the Realm, like the Nobility, are divided into several degrees: and as the Lords, though different in rank, yet all of them are Peers in respect of their Nobility; so the Commoners, though some are greatly superior to others, yet all are in Law Peers, in respect of their want of Nobility. 2 *Inst.* 29. See 1 *Comm. c.* 12.

The rules of precedence, in *England*, are reduced by *Blackstone* to the following table: in which those marked* are entitled to the rank here allotted them, by *stat.* 31 *Hen.* 8. c. 10.—those marked †, by

stat. 1 W. & M. c. 21.—those marked ||, by letters patent 9, 10, and 14 *Jac. I.* which see in *Seld. tit. of Hen. II. 5. 46.* and *II. 11. 3.*—those marked ‡, by antient usage and established custom; for which see (among others) *Camden's Britannia, title Ordines; Milles's Catalogue of Hon. edit. 1610; and Chamberlayne's present State of England, b. 3. c. 3.*

TABLE OF PRECEDENCE.

- * The King's children and grandchildren.
- * brethren.
- * uncles.
- * nephews.
- * Archbishop of Canterbury.
- * Lord Chancellor or Keeper, if a Baron.
- * Archbishop of York.
- * Lord Treasurer.
- * Lord President of the Council. } if Barons.
- * Lord Privy Seal.
- * Lord Great Chamberlain. But see private }
stat. 1 Geo. 1. c. 3.
- * Lord High Constable.
- * Lord Marshal.
- * Lord Admiral.
- * Lord Steward of the Household.
- * Lord Chamberlain of the Household.
- * Dukes.
- * Marquesses.
- ‡ Duke's eldest sons.
- * Earls.
- ‡ Marquesses' eldest sons.
- ‡ Duke's younger sons.
- * Viscounts.
- ‡ Earls' eldest sons.
- ‡ Marquesses' younger sons.
- * Secretary of State, if a Bishop.
- * Bishop of London.
- * Durham.
- * Winchester.
- * Bishops.
- * Secretary of State, if a Baron.
- * Barons.
- † Speaker of the House of Commons.
- † Lords Commissioners of the Great Seal.
- ‡ Viscount's eldest sons.
- ‡ Earls' younger sons.
- ‡ Barons' eldest sons.
- || Knights of the Garter.
- || Privy Counsellors.
- || Chancellor of the Exchequer.
- || Chancellor of the Duchy.
- || Chief Justice of the King's Bench.
- || Master of the Rolls.
- || Chief Justice of the Common Pleas.
- || Chief Baron of the Exchequer.
- || Judges and Barons of the Coif.

} above all Peers of
their own degree.

- || Knights Bannerets, Royal.
- || Viscounts' younger sons.
- || Barons' younger sons.
- || Baronets.
- || Knights Bannerets.
- † Knights of the Bath.
- † Knights Bachelors.
- || Baronets' eldest sons.
- || Knights' eldest sons.
- || Baronets' younger sons.
- || Knights' younger sons.
- † Colonels.
- † Serjeants at Law.
- † Doctors: With whom, it is said, rank Barristers at Law; as to whose Precedence among each other, see title *Pre-audience*.
- † Esquires.
- † Gentlemen.
- † Yeomen.
- † Tradesmen.
- † Artificers.
- † Labourers.

Married women and widows are entitled to the same rank among each other, as their husbands would respectively have borne between themselves; except such rank is merely professional or official;—and unmarried women to the same rank as their eldest brothers would bear among men, during the lives of their fathers. 3 *Comm. c.* 21. *p.* 405. *in n.*

PRECEDENT CONDITIONS; See *Condition IV.*

PRECEDENTS, Authorities to follow in determinations in Courts of Justice.

Precedents have always been greatly regarded by the Sages of the Law: The Precedents of the Courts are said to be the Laws of the Courts; and the Court will not reverse a judgment, contrary to many Precedents. 4 *Rep.* 93: *Cro. Eliz.* 65: 2 *Lil. Abr.* 344. But new Precedents are not considerable; Precedents without judicial decision on argument are of no moment; and an extrajudicial opinion given in or out of our Court, is no good Precedent. *Vaugh.* 169. 382. 399. 429.

It has been held that there can be no Precedent in matters of Equity, as *Equity is universal truth*; but, according to Lord Keeper Bridgman, Precedents are necessary in Equity *to find out the reasons thereof for a guide*; and, besides the authority of those who made them, it is to be supposed they did it on great consideration, and it would be strange to set aside what has been the course for a long series of time. 1 *Mod.* 307. If a man doubt whether a case be equitable, or no, in prudence he will determine as the Precedents have been; especially if made by men of good authority and learning. *Ibid.* See titles *Chancery*; *Equity*.

Lord C. Talbot said, He thought it much better to stick to the *known general rules*, than to follow any one particular Precedent, which may be founded on reasons unknown to us. Such a proceeding would confound all property. *Cases in Chan. in Lord Talbot's Time*, 26, 27. 196.

PRECE PARTIUM, When a suit is continued *by the prayer*, assent, or agreement of both *parties*. See *stat.* 13 *Ed. 1. st. 1. c.* 27.

PRECEPT, *Præceptum*.] Is diversely taken in Law; as sometimes for a command in writing by a Justice of Peace, or other Officer, for bringing a person or records before him; of which there are many examples in the table of the *Register Judicial*. And in this sense it seems to be borrowed from the customs of *Lombardy*, where *Præceptum* significeth *scriptura vel instrumentum*. *Hotom. in verb. Feudal, & lib. 3. Commentar. in libros feudor' in præfatione*.—Sometimes it is taken for the provocation, whereby one man incites another to commit a felony, as theft, murder, &c. *Staundf. Pl. Cor.* 105: *Bracton, lib. 3. tract. 2. cap. 9*, calls it *præceptum* or *mandatum*. Whence we may observe three divisions of offending in murder, *præceptum*, *fortia*, *consilium*; *præceptum* being the instigation used beforehand; *fortia*, the assistance in the fact, as to help to bind the party murdered or robbed; *consilium*, advice either before or in the fact. The *Civilians* use *mandatum* in this case. *Cowell*.

PRE-CONTRACT, mentioned in *stat. 2 & 3 Ed. 6. c. 23*.] A contract made before another contract; the term hath relation especially to marriage. See *Marriage*.

PREDIAL TITHES, *Decimæ prædiales*.] Are those which are paid of things arising and growing from the ground only, as corn, hay, fruit of trees, and such like. See *stat. 2 & 3 Ed. 6. c. 13*: *2 Inst.* 649: *2 Comm. c. 3*: and this Dictionary, title *Tithes*.

PRE-EMPTION, *Præ-emptio*.] The first buying of a thing; it was a privilege heretofore allowed the King's Purveyor, but abolished by *stat. 12 Car. 2. c. 24*: See title *Purveyance*.

PREGNANCY (Plea of). Where a woman is capitally convicted, and pleads her pregnancy, though this is no cause to stay the judgment, yet it is to respite the execution, till she is delivered. See title *Execution of Criminals*.

PREMISES, (or PREMISSES.) That part in the beginning of a deed, the office of which is to express the grantor and grantee, and the land, or thing granted or conveyed. *5 Rep.* 55. See title *Conveyance; Deed II*.

No person, not named in the Premises, can take any thing by the deed, though he be afterwards named in the *habendum*, because the Premises of the deed make the gift; therefore, when the lands are given to one in the Premises, the *habendum* cannot give any share of them to another, because that would be to retract the gift made, and consequently, to make a deed repugnant in itself. Thus, for instance; If a charter of feoffment be made between *A.* of the one part, and *B.* and *D.* of the other part, and *A.* gives land to *B. habendum to B. and D. and their heirs*; *D.* takes nothing by the *habendum*, because all the lands were given to *B.* consequently *D.* cannot hold those lands which are given before to another; but in this case, if the *habendum* had been to *B. and D. and their heirs*, to the use of *B. and D.*; this had been a good limitation of a use; consequently, the statute of uses would carry the possession to the use, and *B. and D.* thereby become joint-tenants. *Co. Lit.* 6. a: 9 *Co.* 47. b: *Hob.* 275. 313: 2 *Rol. Abr.* 65: *Cro. Jac.* 564: *Cro. Eliz.* 58: 13 *Co.* 54: *Poph.* 126.

If lands be given to a husband, *habendum* to him and his wife, and to the heirs of their two bodies, the wife takes nothing, because she was not mentioned in the Premises; therefore shall take nothing of that which was before given entirely to her husband. 2 *Rol. Abr.* 67.

But there are four exceptions to this rule: 1. If the lands be given

in frank-marriage, the woman, who is *the cause of the gift*, may take by the *habendum*, though she be not named in the Premises; as if lands be given to *J. S. habendum maritagium unâ cum* the woman who is daughter of the donor; this is a good estate in frank-marriage to them both; because the gift being totally on her account, it is necessary to the creation of the estate in the husband that the wife should take. *Co. Litt.* 21: *Plowd.* 158: *Cro. Jac.* 455: *Poph.* 126: 2 *Rol. Abr.* 67.

2. In grants of copy of Court-roll; as if a copy-holder surrenders to his lord, without limiting any use, and then the lord grants it in this manner; *J. S. cepit de Domino, habendum* to the said *J. S.* and his wife, and the heirs of their bodies begotten, this is a good estate-tail in the wife; for these customary grants that are made in pursuance of a former surrender, are construed according to the intention of the parties, as wills are; besides, the custom of the manor is the rule for the exposition of such sorts of grants, and, in many manors, such form is usual. *Poph.* 125, 126: *Cro. Jac.* 434: 2 *Rol. Abr.* 67: *Cro. Eliz.* 323.

3. A man not named in the Premises may take an estate in remainder by limitation in the *habendum*. 2 *Rol. Abr.* 68: *Hob.* 313: *Cro. Jac.* 564.

4. In wills; for if a man devises lands to *J. S. habendum* to him and his wife, this is a good devise to the wife; because, in construction of wills, the intention of the deviser is chiefly regarded; and wherever that discovers itself it shall take place, though it be not expressed in those legal forms that are required in conveyances executed in a man's lifetime. *Plowd.* 158, 414: 2 *Rol. Abr.* 68.

PREMIUM, *Præmium*.] A reward: Among merchants it is used for the money the insured gives the insurer for insuring the safe return of any ship or merchandize. See title *Insurance*.

PREMUNIRE. See *Præmunire*.

PRENDER, The power or right of taking a thing before it is offered; from the French *prendre*, i. e. *accipere*: hence the phrase of Law, it lies in *render*, but not in *Prender*. *Rep.* 1.

PRENDER DE BARON, To take an husband.] It is used for an exception to disable a woman from pursuing an appeal of murder, against one who killed her former husband. *St. P. C. lib.* 3. c. 59.

PREPENSED, *Præpensus*.] Forethought; as prepensed Malice is *Malitia Præcogitata*: which makes killing, murder: and when a man is slain on a sudden quarrel, if there were malice Prepensed formerly between the parties, it is murder, or as it is called by the statute Prepensed murder. See title *Homicide* III. 3.

PREROGATIVE, from *præ* and *rogo*, to ask or demand, before or above others.] A word of large extent including all the rights, which, by Law, the King hath as Chief of the Kingdom; and as intrusted with the execution of the Laws. See this Dictionary, title *King* V.

PREROGATIVE COURT, *Curia Prærogativa Archiepiscopi Cantuariensis*.] The Court wherein all wills are proved, and all administrations taken which belong to the Archbishop by his Prerogative; that is, in case where the deceased had goods of any considerable value out of the diocese wherein he died; and that value is ordinarily 5*l.* except it be otherwise by composition between the Archbishop, and some other Bishop, as in the diocese of *London* it is

107. and if any contention grow between two or more, touching such will or administration, the cause is properly decided in this Court: The Judge whereof is termed *Judex curiæ Prærogativæ Cantuariensis*, the Judge of the Prerogative Court of Canterbury. See titles *Courts Ecclesiastical; Will*.

The Archbishop of York hath also the like Court, which is termed his *Exchequer*, but inferior to this in power and profit. 4 *Inst.* 335. As to the Prerogative of the Archbishop of Canterbury or York, see the book intitled *De Antiquitate Britannicæ Ecclesiæ Cantuariensis Historia*, especially the eighth chapter. pag. 25. *Cowell*.

PRESBYTER, A priest, elder or honourable person. *Isidore, lib. 7.*

PRESBYTERIUM, A Presbytery; that part of the church where divine offices are performed, applied to the choir, or chancel; because it was the place appropriated to the Bishop, priests, and other clergy, while the laity were confined to the body of the church. *Mon. Ang. i.* 243.

PRESBYTERIAN, A sectarist, or dissenter from the church. See titles *Nonconformists; Dissenters*.

PREScription.

PRÆSCRIPTIO.] A title acquired by use and time, and allowed by Law; as when a man claims any thing, because he, his ancestors, or they whose estate he hath, have had or used it all the time, whereof no memory is to the contrary: or it is, where for continuance of time, *ultra memoriam hominis*, a particular person hath a particular right against another. *Kitch. 104: Co. Lit. 114: 4 Rep. 32.*

Blackstone classes *Title by Prescription* among the methods of acquiring real property *by purchase*; as when a man can shew no other title to what he claims, than that he, and those under whom he claims, have immemorially used to enjoy it. As to customs, or immemorial usages, in general, with the several requisites and rules to be observed, in order to prove their existence and validity, see this Dictionary, title *Custom*.

I. *Of the Distinction between a Prescription and a Custom or Usage; and who may prescribe.*

II. *What Sort of Things may be prescribed for.*

I. **CUSTOM** is properly a local usage, and not annexed to any person; such as a custom in the manor of *Dale*, that lands shall descend to the youngest son: Prescription is merely a personal usage; as, that such an one and his ancestors, or those whose estate he hath, have used time out of mind to have such an advantage or privilege. 1 *Inst.* 113.—As for example: If there be a usage in the parish of *Dale*, that all the inhabitants of that parish may dance on a certain close, at all times, for their recreation; (which is held to be a lawful usage, 1 *Lev.* 176. See *post* II;) this is strictly a custom, for it is applied to the place in general, and not to any particular persons: but if the tenant, who is seised of the manor of *Dale* in fee, alleges that he and his ancestors, or all those whose estate he hath in the said manor have used time out of mind to have common of pasture in such a close, this is properly called a Prescription; for this is an usage annexed to the person of the owner of his estate. 2 *Comm. c.* 17.

The difference between Prescription, custom, and usage, is also thus stated: Prescription hath respect to a certain person, who by

intendment may have continuance for ever; as for instance, he and all they whose estate he hath in such a thing, this is a Prescription.

Custom is local, and always applied to a certain place; as, time out of mind there has been such a custom in such a place, &c. And Prescription belongeth to one or a few only; but custom is common to all.—Usage differs from both, for it may be either to persons or places; as to inhabitants of a town, to have a way, &c. 2 *Nels. Abr.* 1277.

A custom and Prescription are in the right; usage is in possession; and a Prescription that is good for the matter and substance, may be bad by the manner of setting it forth; but where that which is claimed as a custom, in or for many, will be good, that regularly will be so when claimed by Prescription for one. *Godb.* 54.

Prescription is to be time out of mind; though it is not the length of time that begets the right of Prescription, nothing being done by time, although every thing is done in time; but it is a presumption in Law that a possession cannot continue so long quiet, if it was against right, or injurious to another. 3 *Salk.* 278.

All Prescription must be either in a man and his ancestors, or in a man and those whose estate he hath; which last is called prescribing in a *que estate*. 4 *Rep.* 32. And formerly a man might, by the Common Law, have prescribed for a right which had been enjoyed by his ancestors or predecessors at any distance of time, though his or their enjoyment of it had been suspended for an indefinite series of years. *Co. Litt.* 113. But by the stat. of Limitation, 32 *Hen. 8. c.* 2, it is enacted, that no persons shall make any Prescription by the seisin or possession of his ancestor or predecessor, unless such seisin or possession hath been within threescore years next before such Prescription made. See title *Limitation of Actions*, II. 1.

Prescriptions properly are personal, therefore are always alleged in the person of him who prescribes, *viz.* That he, his ancestors, or all those whose estate he hath, &c. or of a body politic or corporation, they and their predecessors, &c. Also a parson may prescribe, *quod ipse & predecessores sui*, and all they whose estate, &c. for there is a perpetual estate, and a perpetual succession, and the successor hath the very same estate which his predecessor had, which continues, though the person alters, like the case of ancestor and heir. 3 *Salk.* 279.

A Prescription must always be laid in him that is tenant of the fee. A tenant for life; for years, at will, or a copyholder, cannot prescribe, by reason of the imbecility of their estates. 4 *Rep.* 31, 32. For as Prescription is usage beyond time of memory, it is absurd that they should pretend to prescribe for any thing, whose estates commenced within the remembrance of man. And therefore the copyholder must prescribe, under cover of his lord's estate, and the tenant for life under cover of the tenant in fee-simple. As, if tenant for life of a manor would prescribe for a right of common as appurtenant to the same, he must prescribe under cover of the tenant in fee-simple, and must plead that *John Stiles* and his ancestors had immemorially used to have this right of commons appurtenant to the said manor, and that *John Stiles* demised the said manor, with its appurtenances, to him the said tenant for life. 2 *Comm. c.* 17.

Tenants in fee-simple are to prescribe in their own names, and tenants for life or years, &c. though they may not prescribe in their

own names, yet they may in the name of him who hath fee: and where a person would have a thing that lies in grant by Prescription, he must prescribe in himself and his ancestors, whose heir he is by descent; not in himself, and those whose estate, &c.; (unless the *que estate* is but a conveyance to the thing claimed by Prescription;) for he cannot have their estate that lies in grant without deed, which ought to be shewn to the Court. *Co. Litt.* 113.

Parishioners cannot generally prescribe, but they may allege a custom; and inhabitants may prescribe in a matter of easement, way to a Church, burying place, &c. 2 *Saund.* 325: 1 *Lev.* 253: *Cro. Eliz.* 441: *Cro. Car.* 419. 2 *Roll.* 290.

A custom for all the inhabitants of a parish to play at all kinds of lawful games, sports and pastimes in a certain close, at all seasonable times of the year, at their free will and pleasure, is good. But a similar custom for all persons, for the time being, in the said parish, is bad. 2 *H. Black. Rep.* 393. See *post* II.

A Prescription may be laid in several persons, where it tends only to matters of easement or discharge; though not where it goes to matter of interest or profit in *alieno solo*, for that is a title, and the title of one doth not concern the other; therefore several men, having several estates, cannot join in making a Prescription. 1 *Mod.* 74: 3 *Mod.* 250.

Where a man prescribes for a way to such a close, he must shew what interest he hath in the close: *Aliter*, if he prescribes for a way to such a field; because that may be a common field by intendment. *Latch.* 160.

Plaintiff declared, that the occupiers of the adjoining field, have, time out of mind, repaired the fences, which being out of repair, his beasts escaped out of his own ground, and fell into a pit; it is good without shewing any estate in the occupiers; but it had not been so if the defendant had prescribed. 1 *Ventr.* 264.

It should seem that a Prescription by the owner of land, adjoining to a wood, to take underwood there growing to repair the fence belonging to the wood, is not good: for of common right the making of the hedge doth appertain to the owner of the wood; and the Prescription is no more than to take wood in the lands of another, to make the hedges of the same land in which the wood groweth, which cannot be a good Prescription, for it sounds only in charge, and not to the profit of him who prescribes. 1 *Leon.* 313.

Estates gained by Prescription are not, of course, descendible to the heirs general, like other purchased estates, but are an exception to the rule. For, properly speaking, the Prescription is rather to be considered as an evidence of a former acquisition, than as an acquisition *de novo*: and therefore, if a man prescribes for a right of way in himself and his ancestors, it will descend only to the blood of that line of ancestors in whom he so prescribes; the Prescription in this case being indeed a species of descent. But, if he prescribes for it in a *que estate*, it will follow the nature of that estate in which the Prescription is laid, and be inheritable in the same manner, whether that were acquired by descent or purchase: for every accessory followeth the nature of its principal. 2 *Comm. c.* 17. *p.* 266.

II. NOTHING but incorporeal hereditaments can be claimed by Prescription; as a right of way, a common, &c.; but no Prescription

can give a title to lands and other corporeal substances, of which more certain evidence may be had. *Dr. & St. Dial.* 1. c. 8. *Finch.* 132.—For a man shall not be said to prescribe, that he and his ancestors have immemorially used to hold the castle of *Arundel*: for this is clearly another sort of a title; a title by corporal seisin and inheritance, which is more permanent, and therefore more capable of proof, than that of prescription. But as to a right of way, a common, or the like, a man may be allowed to prescribe; for of these there is no corporal seisin, the enjoyment will be frequently by intervals, and therefore the right to enjoy them can depend on nothing else but immemorial usage. See title *Comm. Pew, &c.*

A Prescription cannot be for a thing which cannot be raised by grant. For the Law allows Prescription only in supply of the loss of a grant, and therefore every prescription presupposes a grant to have existed. Thus, the Lord of a Manor cannot prescribe to raise a tax or toll upon strangers; for, as such claim could never have been good by any grant, it shall not be good by Prescription. 1 *Ventr.* 387.

What is to arise by matter of record cannot be prescribed for, but must be claimed by grant, entered on record; such as for instance, the Royal franchises of deodands, felons' goods, and the like. These, not being forfeited till the matter on which they arise is found by the inquisition of a Jury, and so made a matter of record, the forfeiture itself cannot be claimed by any inferior title. But the franchises of treasure-trove, waifs, estrays, and the like, may be claimed by Prescription; for they arise from private contingencies, and not from any matter of record. *Co. Litt.* 114. See title *Franchise*.

Among things incorporeal, which may be claimed by Prescription, a distinction must be made with regard to the manner of prescribing; that is, whether a man shall prescribe in a *que estate*, or in himself and his ancestors. For, if a man prescribe in a *que estate*, (that is, in himself, and those whose estate he holds,) nothing is claimable by this prescription, but such things as are incident, appendant, or appurtenant to lands; for it would be absurd to claim any thing as the consequence, or appendix, of an estate, with which the thing claimed has no connexion: but, if he prescribes in himself and his ancestors, he may prescribe for any thing whatsoever that lies in grant; not only things that are appurtenant, but also such as may be in gross. *Litt.* § 183: *Pinch. L.* 104.—Therefore a man may prescribe, that he, and those whose estate he hath in the manor of *Dale*, have used to hold the advowson of *Dale*, as appendant to that manor: but, if the advowson be a distinct inheritance, and not appendant, then he can only prescribe in his ancestors. So also, a man may prescribe in a *que estate* for a common appurtenant to a manor; but if he would prescribe for a common in gross, he must prescribe in himself and his ancestors. 2 *Comm.* c. 17.

A person may make title by prescription, to an office, a fair, market, toll, way, water, rent, common, park, warren, franchise, Court-leet, waifs, estrays, &c. But no person can prescribe against an Act of Parliament, or against the King, where he hath a certain estate and interest; against the public good, religion, &c. Nor can one Prescription be pleaded against another, unless the first is answered or traversed; or where one may stand with the other. *Lutw.* 381: *Raym.* 252: 2 *Rol. Abr.* 264: 2 *Inst.* 167. 7 *Rep.* 28: *Cro. Car.* 432: 1 *Bulst.* 115: 2 *Lil.* 346.

The word easement is a genus to several species of liberties, which one may have in the soil of another, without claiming any interest in the land itself; but where the thing set forth in a Prescription, was to catch fish in the water of another, &c. and no instance could be given of a Prescription for such a liberty by the word easement, a rule was made to set the Prescription right, and to try the merits. 4 *Mod.* 362. See title *Easement*.

In trespass for breaking the plaintiff's close, the defendant prescribed, that the inhabitants of such a place, time out of mind, had used to dance there, at all times of the year, for their recreation, and so justified; issue being taken on this Prescription, defendant had a verdict; it was objected against it, that a Prescription to dance in the freehold of another, and spoil his grass, was ill, especially as laid in the defendant's plea, *viz.* at all times of the year, and not at seasonable times, and for all the inhabitants; who, though they may prescribe in easements which are necessary, as a way to a church, &c. they cannot in easements for pleasure only: but adjudged that the Prescription is good, issue being taken on it, and found for the defendant; although it might have been ill on demurrer. 1 *Lev.* 175. See *ante* I.

A custom that the farmers of such a farm have always found ale, &c. to such a value, at perambulations, was held naught: because it is no more than a Prescription in occupiers, which is not good in matter to charge the land. 2 *Lev.* 164.

Prescription by the inhabitants of a parish to dig gravel in such a pit, the soil of *W. R.*, it was doubted whether this was good or not, though it was to repair the highway; but the inhabitants may prescribe for a way, and, by consequence, for necessary materials to repair it. 2 *Lutw.* 1346. *Sed qu?* and see *Gateswood's* case, 6 *Co.* 60: where Prescription for common, for every inhabitant of an antient messuage in a parish is held not to be good.

Defendant pleaded, that within such a parish, all occupiers of a certain close *habent, & habere consueverent*, a way leading over the plaintiff's close to the defendant's house; this was held ill, for it is not like a Prescription to a way to the Church or market, which are necessary, *et pro bono publico*. 2 *Ventr.* 186.

A man may claim a fold-course, and exclude the owner of the soil by Prescription. 1 *Saund.* 153.—But a diversity hath been taken where a Prescription takes away the whole interest of the owner of the land; and where a particular profit is restrained: in one case it is good; in the other void. 1 *Leon.* 11.

If a person prescribes for common appurtenant, it is ill, unless it be for cattle *levant & couchant*, &c. And the reason is, because by such a prescription the party claims only some part of the pasture and the *quantum* is ascertained by the levancy and couchancy, the rest being left for the owner of the soil; therefore, if he who thus prescribes, should put in more cattle than are levant and couchant on his tenement, he is a trespasser. *Noy* 145: 2 *Saund.* 324.

In a Prescription to have Common, the Jury found it to be, paying every year a penny. Here the Prescription is entire, whereof the payment of one penny is parcel; which ought to be entirely alleged in the Prescription in the plea, or it will not be good. *Cro. Eliz.* 563. 564. But where the payment is collateral from the Prescription, a Prescription may be good without alleging it. *Cro. Eliz.* 405.

Common for cattle levant and couchant, or a right of common without stint, cannot be claimed by Prescription, as appurtenant to a house without any curtilage or land. *5 Term Rep. K. B.* 46. *8 T. R.* 396.

It was a question, whether a toll, independent of markets and fairs, might be claimed by Prescription, without shewing that the subject hath some benefit; and some arguments were brought for it, from an authority in *Dyer* 352. Though by *Holt*, this Prescription cannot be good, because there was no recompense for it; and every Prescription to charge the subject with a duty, must import some benefit to him who pays it; or else some reason must be shewn why the duty is claimed. *4 Mod.* 319.

A Court-leet is derived out of the hundred; and if a man claims a title to the leet, he may prescribe that he and his ancestors, and all those whose estate he hath in the hundred, time out of mind, had a leet. *Co. Litt.* 125.

There may be a prescription for a Court to hold pleas of all actions, and for any sum or damage; and it will be good. *Jenk. Cent.* 327. If a Court held by Prescription is granted and confirmed by letters patent, this doth not destroy the Prescription; but it is said the Court may be held by Prescription as before. *2 Rol. Abr.* 271.

A grant may enure as a confirmation of a Prescription; and the Prescription continue unaltered by a new charter, &c. where the charter is not contrary to the Prescription. *Moor* 818, 830. But in some cases it is intended, that a Prescription shall begin by grant; and as to Prescriptions in general, the Law supposes a grant, or purchase originally. *Cro. Eliz.* 709: *Co. Litt.* 113.

Every Prescription is taken strictly: and a man ought not to prescribe to that which the Law, of common right gives. *3 Leon.* 13: *Noy* 20.

A Prescription must have a lawful commencement, and peaceable possession and time are inseparably incident to it. *Co. Litt.* 113. Though a title gained by custom or Prescription, will not be lost by interruption of the Possession for ten or twenty years; but it may be lost, by interruption in the right. *Co. Litt.* 114: *2 Inst.* 653.

PRESCRIPTIONS against Actions and Statutes; See title *Limitation of Actions* II. 2.

PRESCRIPTIONS by the Ecclesiastical Law, as to tithes, &c. See *Modus Decimandi; Tithes.*

PRESENCE. Sometimes the Presence of a superior Magistrate takes away the power of an inferior. *9 Rep.* 118. And the Presence of one may serve for all the feoffees or grantees, &c. *3 Rep.* 26. When the Presence of a man, in the place where an offence is due, may make him guilty, vide *Accessory.*

PRESENTATION, *Presentatio.*] The act of a patron, offering his clerk to the Bishop of the diocese, to be instituted in a church or benefice of his gift, which has become void. See titles *Advowson; Parson.*

PRESENTEE, The clerk presented to a church by the patron. In *stat.* 13 R. 2. *st.* 1. *c.* 1. the King's Presentee, is he whom the King presents to a benefice.

PRESENTMENT, A mere denunciation of Jurors, or some officers, &c. (without any information) of an offence, inquirable in the

Court where it is presented. *Lamb. Eiren. lib. 4. c. 5.* Or it may be defined to be an information made by the Jury in a Court, before a Judge who hath authority to punish an offence. *2 Inst. 739.*

The Presentment is drawn up in *English* by the Jury, in a short note, for instructions to draw the indictment by; and differs from an indictment, in that an indictment is drawn up at large, and brought ingrossed to the Grand Jury to find. *2 Lill. Abr. 353.*

There are also Presentments of Justices of Peace in their Sessions of offences against statutes, in order to their punishment in superior Courts; and Presentments taken before Commissioners of Sewers, &c. Presentments are made in Courts-leet and Courts-baron, before stewards; and, in the latter of surrenders, grants, &c. Also by constables, churchwardens, surveyors of the highways, &c. of things belonging to their offices. See this Dictionary, titles, *Copyhold; Surrender.*

A *Presentment*, generally taken, is a very comprehensive term; including not only Presentments, properly so called, but also inquisitions of office, and indictments by a grand Jury. A Presentment, *properly speaking*, is the notice taken by a Grand Jury of any offence from their own knowledge or observation, without any bill of indictment laid before them, at the suit of the King. *Lamb. Eiren. l. 4. c. 5.*—As the Presentment of a nuisance, a libel, and the like; upon which the officer of the Court must afterwards frame an indictment before the party presented can be put to answer it. *2 Inst. 739.* An inquisition of office is the act of a Jury, summoned by the proper officer to inquire of matters relating to the Crown, upon evidence laid before them. See title *Inquest.* Some of these are in themselves Convictions, and cannot afterwards be traversed or denied; and therefore the inquest or Jury ought to hear all that can be alleged on both sides. Of this nature are all Inquisitions of *felo de se*; of flight in persons accused of felony; of deodands, and the like: and Presentments of petty officers in the Sheriff's-tourn or Court-leet, whereupon the presiding officer may set a fine. Other Inquisitions may be afterwards traversed or examined; as particularly the Coroner's inquisition of the death of a man, when he finds any one guilty of homicide: for in such cases the offender so presented must be arraigned upon this inquest, and may dispute the truth of it, which brings it to a kind of indictment. See further title *Indictment; Highways.*

PRESIDENT, *Præses.*] The king's lieutenant in any province; as, President of *Wales, &c.*

PRESIDENT OF THE COUNCIL, Is the fourth great officer of State. See title *Precedence.* He is as antient as the reign of King *John*; and hath sometimes been called *Principalis Consiliarius*, and other times *Capitalis Consiliarius*.—During the reign of *Q. Elizabeth*, the office remained dormant. It appears to have been exercised in the reign of *Jac. I.* and was revived by *Charles II.* See title *Privy Council.*

The office of President of the Council has been always granted by letters patent under the Great Seal *durante bene placito*: and this officer is to attend on the King, to propose business at the Council-table, and report to His Majesty the transactions there: also he may associate the Lord Chancellor, Treasurer, and Privy Seal, at naming

of Sheriffs; and all other acts limited by any statute, to be done by them. 21 *Hen. 8. c. 20.* See 1 *Comm.* 230.

PRESS, *Liberty of the*; See *Libel*, IV.; *Jury*.

PRESSING, for the Sea-service; See this Dictionary, title *Impressing Seamen*.

PRESSING TO DEATH; See *Mute*.

PREST, A duty in money to be paid by the Sheriff on his account, in the Exchequer, or for money left, or remaining in his hands. See *stat. 2 & 3 Ed. 6. c. 4.*

PRESTATION-MONEY, *Præstatio*, a paying or performing.] Is a sum of money paid by Archdeacons yearly to their bishop *pro exteriore jurisdictione*—*Et sint quieti à Præstatione muragii.* *Chart. H. 7. Burgens. Mount-Gomer.* *Præstatio* was also antiently used for Purveyance. See *Philips's* book on that subject, *p.* 222.

PREST-MONEY, from the French *prest*, *promptus*, *expeditus*; for that it binds those who receive, to be ready at all times appointed, being meant commonly of soldiers. See *stats. 18 H. 6. c. 19: 7 H. 7. c. 1: 2 & 3 Ed. 6. c. 2.*

PRESUMPTIO, Was antiently taken for intrusion, or the unlawful seizing of any thing. *Leg. Hen. 1. c. 11.*

PRESUMPTION, *Presumptio*.] A supposition, opinion, or belief previously formed. *Co. Litt. 6, 375: Wood's Inst. 599.*

Though Presumption is what may be doubted of, yet it shall be accounted truth, if the contrary be not proved. 2 *Lill. Abr.* 354. But no Presumptions ought to be admitted against the Presumptions of Law, and wrong shall never be presumed. *Co. Litt.* 232, 273.

If the eldest son be beyond sea at the death of the ancestor, and the youngest enters into the land, he is not accounted in Law a disseisor: because the Law presumes, that he preserves the possession for his brother: but if on his brother's return he keeps him out of possession, then the Law looks on him as a disseisor. *Latch.* 68. See titles *Evidence; Life Estate*.

Where the Law intrusts persons with the execution of a power, the Court will presume in favour of their execution of that Power: though if they make a false return whereby the party and Justice are abused, they may be punished. 12 *Mod.* 382.

Presumptions are said to be either *juris & de jure*, or *juris*, or *hominis vel judicis*. The presumption *juris & de jure* is that where Law or Custom establishes the truth of any point, on a presumption that cannot be traversed on contrary evidence: Thus a Minor, or infant under age with Guardians is deprived of the Power of acting without their consent, on a presumption of incapacity which cannot be traversed. The *presumptio juris* is a presumption established in law till the contrary be proved, as the property of goods is presumed to be in the possessor: Every Presumption of this kind must necessarily yield to contrary proof.—The *presumptio hominis vel judicis* is the conviction arising from the circumstances of any particular case.

PRESUMPTIVE EVIDENCE; See titles *Evidence; Felony; Homicide, &c.*

PRESUMPTIVE HEIRS, Such Persons who, if the ancestor should die immediately, would, in the present circumstances of things, be his heirs; but whose right of inheritance may be defeated by the contingency of some nearer heir being born. See title *Descent I.*

PRETENDED TITLES, Buying or selling; See titles *Champerly*; *Maintenance*.

PRETENSED RIGHT, *Jus Prætensum*.] Where one is in possession of Land, and another who is out of possession claims and sues for it; here the Pretensed Right or title is said to be in him who so claims and sues for the same. See *Mod. Cas.* 302.

PRETIUM AFFECTIONIS; an imaginary value put on a thing by the fancy of the owner, in his affection for it.—*Bell's Scotch Dict.*

PRETIUM SEPULCHRI; See title *Mortuary*.

PRICE; See titles *Consideration*; *Agreement*, &c.

PRIDE GAVEL, from *frid*, the last syllable of *lamfrid*, and *gavel*, a rent or tribute.] In the manor of *Rodeley* in the county of *Gloucester*, is a rent paid to the Lord, by certain tenants, in duty and acknowledgment to him for the privilege of fishing for lampreys or lamprids in the river *Severn*. *Tayl. Hist. Gavelk.* 112.

PRIESTS, In general signification, are any ministers of a church; but in our Law, this word is particularly used for ministers of the church of *Rome*. See title *Papists*.

PRIMAGE, A duty at the Water-side, due to the master and mariners of a ship; to the master for the use of his cables and ropes, to discharge the goods of the Merchant; and to the Mariners for lading and unlading in any port or haven; it is usually about 12d. *per* ton, or sixpence *per* pack or bale, according to custom. *Merch. Dict.* See *Stat.* 32 *H.* 8. c. 14.

PRIMATE, an Archbishop who has a distinguishing rank from all other Archbishops and Bishops.

PRIMER-FINE, On suing out the writ or *præcipe*, called a writ of covenant, there is due to the King, by antient prerogative, a Primer Fine, or a Noble for every five marks of Land sued for; that is, one-tenth of the annual value. See title *Fine of Lands* I. 1.

PRIMICERIUS, The first of any degree of men; sometimes it signifies the nobility. *Primicerios totius Angliæ*, the Nobility of *England*. *Mon. Angl.* i. 838.

PRIMIER SEISIN, *Prima seisin*.] The first possession, or seisin; heretofore used as a branch of the King's prerogative whereby he had the first possession, that is, the entire profits for a year of all the lands and tenements, whereof his tenant (who held of him in *capite*) died seised in his demesne as of fee, his heir being then at full age, until he did homage, or, if under, until he were of age. *Staundf. Prærog. cap.* 3, and *Bracton*, l. 4. tr. 3. c. 1. But all the charges arising by *Primier Seisins* are taken away by *stat.* 12 *Car.* 2. c. 24. See title *Tenures*.

PRIMIER SERGEANT, The King's first Serjeant at Law. See title *Precedence*.

PRIMO BENEFICIO, The first Benefice in the King's gift, &c. See *Beneficio prius*, &c.

PRIMOGENITURE, *Primogenitura*.] The title of an elder son or brother in right of his birth: the reason of which *Coke* says, is, *Qui prior est tempore, potior est jure*; affirming moreover, That, in King *Alfred's* time, knights' fees descended to the eldest son; because, by the division of such fees between males, the defence of the realm might be weakened. And *Dodderidge*, in his treatise of Nobility, saith, (*pag.* 119.) it was antiently ordained, That all knights' fees should come unto the eldest son by succession of heritage;

whereby he, succeeding his ancestors in the whole inheritance, might be the better enabled to maintain the wars against the King's enemies, or his Lord's: and that the socage should be partible among the male children to enable them to increase into many families, for the better furtherance in, and increase of husbandry. *Cowell*, and *Leg. Alfred. Dodd. Treat. Nobil.* 119. See title *Descent*.

PRINCE, *Princeps*.] Sometimes taken at large for the King himself; but more properly for the King's eldest son, who is called **PRINCE OF WALES**. See title *King II*.

It is said by some writers, that the King's eldest son is Prince of *Wales* by Nativity; but others say, that he is born Duke of *Cornwall*, and afterwards created Prince of *Wales*, though from the day of his birth he is stiled Prince of *Wales*, a title originally given by *Edward I.* to his son. His titles are, Prince of *Wales*, Duke of *Cornwall*, and Earl of *Chester*.

Before *Edward II.* who was the first Prince of *Wales*, and born at *Caernarvon* in that Principality, (his mother being sent there big with child by *Edward I.* to appease the tumultuous spirit of the *Welch*;) the eldest son of the King was called Lord Prince; but Prince was a name of dignity long before that time in *England*. *Staundf. Prærog.* c. 22, 75. See *stats.* 27 *H.* 8. c. 26: 28 *H.* 8. c. 3. And *Stow's Annals*, p. 303. In a charter of King *Offa*, after the Bishops had subscribed their names, we read *Brordanus Patricius*, *Binnanus Princeps*: and afterwards the Dukes subscribed their names. And in a charter of King *Edgar*, in *Mon. Angl. tom.* 3. p. 302; *Ego Edgarus Rex rogatus ab episcopo meo Deorivolfse, & Principe meo Alfredo*, &c. And in *Matt. Paris*, p. 155; *Ego Halden Princeps Regis pro viribus assensum præbeo, & ego Turketillus Dux concedo*.

As Duke of *Cornwall*, and likewise Earl of *Chester*, the Prince of *Wales* is to appoint the Sheriffs, and other Officers, in those Counties. The Prince of *Wales*, besides the revenues of the Principality of *Wales*, Duchy of *Cornwall*, &c. has also an income settled on him, from time to time, by Parliament. See *stat.* 33 *Geo.* 3. c. 78, enabling the Prince to make leases in the Duchy of *Cornwall*; and *stat.* 35 *Geo.* 3. c. 125, for preventing the accumulation of debts by any future Heir-Apparent of the Crown, and for regulating his mode of expenditure from the time of his having a separate establishment.

PRINCIPAL, *Principalium*.] Is variously used in our law; as an heir loom, &c.

The word principal was also sometimes antiently used for a mortuary, or corse-present. See title *Mortuary*.

In *Urchensfield* in the county of *Hereford*, certain Principals, as the best beast, the best bed, the best table, &c. pass to the eldest child, and are not liable to partition.

The chief person in some of the Inns of Chancery is called Principal of the house. *Cowell*.

PRINCIPAL AND ACCESSARY; See this Dictionary, title *Accessory*.

PRINCIPAL CHALLENGE, a species of the challenge to Jurors for suspicion of partiality. This takes place where the cause assigned carries with it *primâ facie* evident marks of suspicion, either of malice or favour. See titles *Jury II*; *Challenge*.

PRINTING; See *Books*; *Libel*; *Literary Property*.

By 39 *Geo.* 3. c. 79. § 23—33. certain restrictions are imposed on

Printers and others for the preventing of Treasonable and Seditious Publications.—Printers, Letter-Founders, and Printing press makers, are to register their Names with the Clerk of the peace. The name and abode of the printer is to be printed at the beginning and end of every book, and on the front of every paper printed; and one copy thereof is to be kept by the Printer with the name of his employer written thereon, and to be produced on demand any time within six months after the time of printing. One justice of Peace may empower a Peace Officer to search for presses and types suspected to be illegally used: which may be seized, together with any printed papers found on the premises. The King's Printer, the public presses in the universities, and the papers printed by authority of parliament, or other public boards, are excepted from the operation of this act. See 39 & 40 *Geo. 3. c. 95*, and 41 *Geo. 3. (U. K.) c. 80*.

PRINTS AND ENGRAVINGS; See title *Literary Property*.

PRIOR, Was in dignity next to the Abbot, or the chief of a convent, &c. See title *Abbot*.

PRIORS ALIENS, *Priores Alieni*.] Were certain religious men, born in *France and Normandy*, Governors of Religious Houses erected for foreigners here in *England*; but were suppressed by *Henry V.* and afterwards their livings were given to other monasteries and houses of learning, and especially towards the erecting of the King's Colleges, at *Cambridge and Eaton*. 2 *Inst.* 584. See *Stow's Annals*, 582: and *stat. 1 Hen. 5. c. 7*.

PRIORITY, *Prioritas*.] An antiquity of tenure, in comparison of another less antient. *Old Nat. Br.* 94. *Crompt.* in his *Jurisd.* fol. 117. useth this word in the same signification. The Lord of the Priority shall have the custody of the body, &c. and fol. 120: if the tenant hold by priority of one, and by Posterity of another, &c. To which effect, see also *F. N. B.* 142. and tit. *Posteriority*.

PRIORITY OF DEBTS AND SUITS; See titles *Action*; *Abatement*; *Pleading*, &c.—As to payment of Debts by an Executor in order of Priority; see this Dictionary, title *Executor* V. 6.—As to Priority of mortgages, see title *Mortgage* III.

There is no Priority of time in Judgments; for the Judgment first executed shall be first paid. See title *Judgment*.

Wherever any suit on a penal statute may be said to be actually depending, it may be pleaded in abatement of a subsequent prosecution, being expressly averred to be for the same offence. Neither will it be any exception to such a plea, that the Offence in a subsequent prosecution is laid on a day different from that in the former. Neither doth a mistake in such a plea of the very day, whereon the suit pleaded as prior was commenced, seem to be material on the issue of *nul tiel record*, if it appear in truth to have been commenced before the other, and for the same matter.

And if two informations be exhibited on the very same day, it seems that they may mutually abate one another; because there is no Priority to attach the right of the suit in one informer, more than in the other. Also it seems, that an information or bill the same day that they are filed, may be so far said to be depending before any process sued on them, that they may be pleaded in abatement of any other suit on the same statute. And from the same reason it seems also, that a writ of debt may be so pleaded in abatement of any other suit on the same statute; and from the same reason it seems also that

a writ of debt may be so pleaded after it is returned; because then it seems to be agreed, that it may be properly said to be depending; and whether it may not also be so pleaded before it be returned, seems questionable; because, according to some opinions, a writ may be said to be depending as soon as purchased. 2 *Hawk. P. C. c. 26.* § 63. See title *Information*.

Those points of law, where *Hawkins* seems to doubt, are now, in general, pretty clearly settled, according to what appeared to be his opinion.

PRISAGE, *Prisagium*.] That share which belongs to the King, or Admiral, out of such merchandises as are taken at sea, by way of lawful prize, which is usually a tenth part. See *stat. 31 Eliz. c. 5*.

PRISAGE OF WINES is an antient duty or custom on wines, payable at certain ports, except *London, Southampton, &c.* It is where the King claims out of every ship or vessel laden with wine, containing twenty tons or more than two tons of wine, the one before, the other behind the mast, at his price, which is twenty shillings for each ton; but this varies according to the custom of places; and at *Boston* every bark laden with ten tons of wine or above, pays Prisage. This word is almost out of use, being now called *Butlerage*, because the King's chiefbutler receives it. See title *Customs on Merchandise*.

By 43 G. 3. c. 156. the Treasury were empowered to purchase the duties of Prisage, and the butlerage in *Great Britain*, and a contract for that purpose with the Duke of *Grafton*, is confirmed by 46 G. 3. c. 79.—By 46 G. 3. c. 94. the Treasury of *Ireland* were empowered to purchase the duty of Prisage in that country from the Earl of *Ormond*.

PRISE; See *Prize*.

PRISO, A prisoner taken in war. *Hoveden, p. 541.*

PRISON, *Prisona*.] A place of confinement for the safe custody of persons, in order to their answering any action, civil or criminal. See title *Gaol*.

PRISON BREAKING; See title *Gaol*, III.

PRISONER, *Prisonarius*, Fr. *Prisonnier*.] One confined in prison, on an action, or commandment: and a man may be a prisoner on matter of record, or of fact: a prisoner on matter of record, is he who, being present in Court, is by the Court committed to prison; and the other is on arrest, by the Sheriff, &c. *Staundf. P. C. 34, 35.* See titles *Gaol*, II; *Debtors*; *Execution*, III. 4; *Insolvent Debtors*.

PRIT; See *Pleading*.

PRIVATEERS, A kind of private men of War, the persons concerned wherein administer, at their own costs, a part of a war, by fitting out these ships of force, and providing them with all military stores; and they have instead of pay, leave to keep what they take from the enemy, allowing the Admiral his share, &c.

Privateers may not attempt any thing against the laws of nations; as to assault an enemy in a port or haven, under the protection of any Prince or Republic, whether he be friend, ally, or neuter; for the peace of such places must be inviolably kept; therefore by a treaty made between King *William* and the States of *Holland*, before a commission shall be granted to any Privateer, the commander is to give security, if the ship be not above 150 tons, in 1500*l.* and if the ship exceed that burden, in 3000*l.* that they will make satisfaction for all damages which they shall commit in their courses at sea, contrary to the treaties with those States, on pain of forfeiting their commissions; and the ship is made liable. *Lex Mercat. 177, 178.*

Besides these private commissions, there are special commissions for Privateers, granted to commanders of ships, &c. who take pay, and are under a marine discipline: and if they do not obey their orders, may be punished with death. And the wars in latter ages, have given occasion to Princes to issue these commissions, to annoy the enemies in their commerce, and hinder such supplies as might strengthen them, or lengthen out the war; and likewise to prevent the separation of ships of greater force from their fleets or squadrons. See titles *Letters of Marque; Admiralty*.

PRIVATION, *Privatio*.] A taking away or withdrawing: most commonly applied to a Bishop or Rector, when by death, or other act, they are deprived of their preferments; it seems to be an abbreviation of the word Deprivation. *Co. Litt.* 239.

PRIVEMENT ENSIENT, The term to signify a woman being with child; but not quick with child. *Wood's Inst.* 662.

PRIVIES, from the Fr. *Privé*, i. e. *Familiaris*.] Those who are partakers, or have an interest in any action or thing, or any relation to another; as every heir in tail is privy to recover the land entailed, &c. *Old Nat. Br.* 117.

There are five several kinds of Privies, viz. Privies of blood, such as the heir to the ancestor; Privies in representation, as executors or administrators, to the deceased; Privies in estate, between donor and donee, lessor and lessee, &c. Privies in respect of contract; and Privies on account of estate and contract together. 3 *Rep.* 23. 123: 4 *Rep.* 123: *Latch.* 260.

It is also said, that there are three sorts of Privies and Privities; in estate, in blood, and in law.

Privies in blood are intended of Privies in blood inheritable, and this in three manners, viz. inheritable as general heir, or as special heir, or as general and special heir.

Privies in estate, as joint tenants, baron and feme, donor and donee, lessor and lessee, &c.

Privies in law are, when the law, without blood or privity of estate, casts the land on one, or makes his entry lawful; as lord by escheat, lord who enters for mortmain, lord of villein, &c. 8 *Rep.* 42, b: *Jo.* 32.

The Author of the *New Terms of the Law* maketh many sorts of Privies, viz. Privies in estate, Privies in deed, Privies in law, Privies in right, and Privies in blood. See *Perkins*, 831, 832, 833. *Coke*, lib. 3. f. 23. and lib. 4. 123, 124. mentions four kinds of Privies, viz. Privies in blood, as the heir to his father; Privies in representation, as executors or administrators to the deceased; Privies in estate, as he in reversion, and he in the remainder, when land is given to one for life, to another in fee, for that their estates are created both at one time: the fourth is Privy in tenure, as the lord by escheat, that is, when the land escheateth to the lord for want of heirs. *Cowell*.

If a fine be levied, the heirs of him who levied it are termed Privies. See title *Fine of Lands* I. If a lessor grants his reversion, the grantee and lessee are Privies in estate: Privies in contract extend only to the persons of the lessor and lessee; and where the lessee assigns all his interest, here the lessor and lessee remain Privy in contract, but not in estate, which is removed by the assignment. 3 *Rep.* 23.

Privies, in respect of estate and contract, appear, where the lessee assigns his interest; but the contract between the lessor and lessee, as to action of debt, continues, the lessor not having accepted of the assignee. 3 *Lev.* 295.

If the lessor grants over his reversion, or if the reversion escheat, now between the grantee, or the lord by escheat, and the lessee, there is Privy in estate only.

Privy of contract only, is personal Privy, and extends only to the person of the lessor, and to the person of the lessee; as when the lessee assigned over his interest, notwithstanding his assignment, the Privy of the contract remained between them, though Privy of the estate be removed by the act of the lessee himself; and the reason of this is,

1st, Because the lessee himself shall not prevent by his own act such remedy, which the lessor had against him by his own contract; but when the lessor granted over his reversion, there, against his own grant, he cannot have remedy, because he has granted the reversion to the other, to which the rent is incident.

2dly, The lessee may grant the term to a poor man who shall not be able to manure the land, and who will by indigence, or for malice, permit it to lie fresh, and then the lessor shall be without remedy, either by distress, or by action of debt, which shall be inconvenient, and will concern in effect every man (because for the most part every man is a lessor, or a lessee); and for those two reasons all the cases of entry by tort, eviction, suspension, and apportionment of the rent are answered; for in such cases, it is either the act of the lessor himself, or the act of a stranger; and in none of the cases, the sole act of the lessee himself shall prevent the lessor of his remedy, for that it will introduce such inconvenience as has been said. See title *Lease* I. 3.

Privy of contract and estate together, is between the lessor and lessee himself. 3 *Repf.* 23.

Where there are Privies in contract, and the Privy is altered by assignment of an executor, &c. before any rent due, and after the Privy of estate, by the assignment of the executor's assignee, nothing remains whereby to maintain any action. *Latch.* 260.

There are likewise Privies indeed, or in Law; where the deed makes the relation; or the Law implies it, in case of escheats to the lord, &c. And only parties and Privies shall take advantage of conditions of entry on lands, &c. *Co. Litt.* 516.

If I deliver goods to a man, to be carried to such a place, and he, after he hath brought them thither, steal them, it is felony; because the Privy of delivery is determined as soon as they are brought thither. *Staundf. Pl. Cor. lib. 1. cap. 15.* 25. Merchants privy are opposed to merchant strangers in *stat. 2 Ed. 3. c. 9.* 15.

Privies inheritable, as heir general, shall take benefit of the infancy; as if infant tenant in fee-simple makes feoffment, and dies, his heir shall enter. The same law of him who is heir general and special, and also of him that is heir special, and not general. But Privies in estate (unless in some special cases) shall not take advantage of the infancy of the other. 8 *Repf.* 42. b. 43.

PRIVILEGE.

PRIVILEGIUM.] Is defined by *Cicero*, in his oration *pro domo sua* to be *lex privato homini irrogata*. It is, says another, *Jus singulare*, whereby a private man, or a particular Corporation, is exempted from the rigour of the Common Law. It is sometimes used in Law for a place which hath some special immunity. *Kitchin* 118.

Privilege is either personal or real: a personal Privilege is, that which is granted to any person, either against or beyond the course of the Common Law in other cases; as for example, Privilege of Parliament.

A Privilege real is that which is granted to a place, as to the Universities, that none of either may be called to *Westminster Hall*, on any contract made within their own precincts, or prosecuted in other Courts: and one belonging to the Court of Chancery, cannot be sued in any other Court, certain cases excepted; and if he be, he may remove it by writ of Privilege, grounded on the statute 18 E. 3. *Cowell*. Officers of that Court are to be sued in the petty bag office.

Privilege is an exemption from some duty, burden, or attendance, to which certain persons are entitled; from a supposition of Law, that the stations they fill, or the offices they are engaged in, are such as require all their care; that therefore, without this indulgence, it would be impracticable to execute such offices, to that advantage which the public good requires. 4 *New Abr.* 215.

- I. *Of Privilege in Suits, allowed Officers and Attendants in the Courts of Justice; and see titles Abatement I. 3. (a); Attorney.*
- II. *Of the Privilege of Peers and Members of Parliament; in addition to what is said under titles Parliament; Peer.*
- III. *Of the Proceedings in Courts, by and against Persons entitled to Privilege of Parliament.*

I. THE Officers, Ministers, and Clerks of the Courts in *Westminster Hall* are allowed particular Privileges in respect of their necessary attendance on those Courts; they are regularly to sue and be sued in the Courts they respectively belong to, and cannot (except in certain cases) be impleaded elsewhere; which Privilege arises from a supposition of Law, that the business of the Court, or their clients' causes would suffer by their being drawn into another than that in which their personal attendance is required. 2 *Inst.* 551: 4 *Inst.* 71: *Vaugh.* 154: *Dyer* 377. a. *fil.* 30.

The following extract from *Tidd's Pract. K. B.* applies in general, not only to Attornies, but to all other Officers of the Court; and details the nature of the Practice by and against them; authorities are cited by Mr. *Tidd* for all the positions laid down.

Where an Attorney is plaintiff, he is entitled to sue in his own Court, by attachment of Privilege, and may lay the *venue* in *Middlesex*. But an Attorney or other privileged person, defendant, has not the privilege of changing the *venue* into *Middlesex*, when it is laid in another county. Where he is defendant, he must be sued in his own Court by bill, even as acceptor of a bill of exchange, or for a debt under forty shillings; and cannot be arrested or holden to special bail. It is also said, that an Attorney is entitled to have his cause tried at bar. These Privileges are allowed not so much for the benefit of At-

tornies, as of their clients; and are therefore confined to Attornies who practise, or at least have practised within a year: and they are never allowed against the King; but actions *qui tam* are not considered as the King's actions. Neither are they allowed to Attornies, as against each other: It being a general rule, that there can be no Privilege against Privilege. But this rule only applies to Attornies of the same Court; for where they are of different Courts, the plaintiff is entitled to his Privilege. It is also settled, that an Attorney shall not be allowed his Privilege, where he sues or is sued *in auter droit*, as executor or administrator; or jointly with his wife, or other person who is not privileged; or where there would otherwise be a failure or defect of justice; as where an appeal, which only lies in the Court of K. B. is brought against an Attorney of the Common Pleas, or such an Attorney is in the actual custody of the Marshal: but where an Attorney of the Common Pleas puts in bail, to an action depending in the Court of K. B. he does not thereby lose his Privilege; but may plead it in that action, or in any other brought against him by the bye; for it would be absurd, that he who founds his action on that of another, should be in a better condition than the original plaintiff. Yet where an Attorney, having put in bail, waives his Privilege, by pleading in chief, in one action, it is construed to be a waiver of Privilege, in all other actions brought against him by the bye, during the same term.

The Attachment of Privilege, at the suit of an Attorney, is in nature of a *Latitat*: therefore, in replying it to a plea of the statute of Limitations, the plaintiff must set forth the continuances: and, like a *Latitat*, it may be sued out, and will warrant proceedings, against several defendants for distinct causes of action. In suing it out, the rule is, that "every Attorney shall leave a *præcipe* with the signer of the writs, containing the defendants' names, not exceeding four in each writ, with the return and day of signing such writ, and the agent's or Attorney's name who sued out the same; and that all such *præcipes* shall be entered on the roll, where the *præcipes* of *Latitats*, and all other writs issuing out of this Court are entered; and the Officer, that signs the writs in this Court, shall not sign such attachment, till a *præcipe* be left with him for that purpose." *R. Hil. 20 Geo. 2.*

An Attorney was formerly permitted to hold the defendant to special bail upon an attachment of Privilege, for fees or disbursements, however trifling. But now, since the statutes for preventing frivolous and vexatious arrests, the defendant cannot be arrested and holden to special bail, upon an attachment of Privilege, or any other process, unless the cause of action amount to ten pounds or upwards. Where it is under that amount, the defendant must be served with a copy of the process, and notice to appear, as in other cases.

The time allowed for declaring upon an attachment of Privilege, is the same as upon a *Latitat*, or other process in trespass. And if an Attorney sue out an attachment of Privilege, and deliver or file his declaration, and give notice thereof, four days exclusive before the end of the term wherein the attachment is returnable, the defendant must plead as that of term; the plaintiff having entered a rule to plead, and demanded a plea: but if he do not declare within that time, the defendant may imparl to the next term; and if he do not declare before the *essoin* day, the defendant will have an *imparlance* to the term following.

The *bill against* an Attorney is a complaint in writing, describing the defendant as *being present in Court*; and generally concludes with a *prayer of relief*, though the declaration upon the bill is not demurrable for want of it. Formerly, the bill against an Attorney could only have been filed in term time, *sedente curiâ*, and not in vacation. But now it may be filed in vacation, as well as in term time: though if it be filed in vacation, otherwise than to avoid the statute of Limitations, the plaintiff will not be allowed his costs, if the action be settled before the ensuing term.

In practice, it is usual to file the bill on stamped parchment, with the Clerk of the declarations, in the King's Bench Office; and to deliver a copy of it, on stamped paper, to the defendant, with notice thereon to plead in four days. And if the bill be filed, and a copy thereof delivered, four days exclusive before the end of the term, including *Sunday*, the defendant must plead as of that term; the plaintiff having entered a rule to plead, and demanded a plea: but if the bill be not filed, and a copy delivered within that time, the defendant is entitled to an imparlance. See title *Pleading*.

The rest of the Proceedings, by and against Attornies, are the same as in other cases; only that they are not bound to pay for copies of the pleadings.

Where *J. S.* was arrested in *B. R.* and after the arrest he procured himself to be made an Attorney of *C. B.* and prayed his privilege, it was disallowed, because it accrued *pendente lite*. 2 *Rol. Rep.* 115.

If an Attorney lays his action in *London*, the Court will change the venue on the usual affidavit; for, by not laying it in *Middlesex*, he seems regardless of his privilege, and is to be considered in the same light as an unprivileged person. 2 *Vent.* 47; *Salk.* 668.

As to other persons than Attornies claiming Privilege; the following cases are deserving notice:

Anderson, Ch. J. of *C. B.* brought trespass by bill for breaking his house in the city of *Worcester*, against a citizen of that city; the Mayor and Commonalty came and shewed a Charter granted by *Edward VI.* and demanded conusance of pleas; but it was refused, because the Privilege of that Court, of which the plaintiff was a Chief Member, is more antient than the patent; for the Justices, Clerks, and Attornies, ought to be there attending their business, and shall not be impleaded or compelled to implead others elsewehre; and this privilege was given the Court on the original erection of it. 3 *Leon.* 149.

In debt against the Warden of the Fleet, by bill of Privilege, he refused to appear; the Court doubted how they could compel him, as they could not forejudge him the Court, he having an inheritance in his office; but it being surmised that he made a lease of his office, it was held that he should not have his Privilege, for that the lessee, and not he was the officer during the lease. 2 *Leon.* 173.

So, if the Marshal of *B. R.* grants his place for life; the grantor has no Privilege during that time. 1 *Vent.* 65.

A Clerk of *B. R.* was sued in an inferior Court for a debt under five pounds, and had a writ of Privilege allowed; for the *stat.* 21 *Jac.* 1. c. 23. never intended to take away the Privilege of Attornies. *Palm.* 403.

In the Court of Exchequer there are three sorts of Privilege: 1st. As Debtor. 2dly. As Accountant. 3dly. As Officer. *Hard.* 365.

J. S. was sued in *London*, which he removed into *B. R.* and afterwards prayed his Privilege of the Court of Exchequer; and on the puisne Baron's coming into Court, and bringing the red book of the Exchequer, which shewed that he was an Escheator, and so an Accountant to the King, the privilege was allowed. *Noy* 40. *Sed qu?* The Officer having chosen the court of *B. R.* for determination of his suit, and thereby, as it seems, submitted to the jurisdiction.

If one holds of the Queen as of her manor, he shall not have the Privilege of the Exchequer for that cause: but if the King grants tithes, and thereupon reserves a rent *nomine decimæ*, and a tenure of him, there he shall have Privilege. 2 *Leon.* 21.

A *Latitat* being sued out against the Commissioners of the Treasury, the puisne Baron of the Exchequer came into the Court of *B. R.* and brought the red book of the Exchequer, which is deemed a Record in that Court; and thereby it appeared, that the Treasurer had Privilege of being sued only in that Court; and the patent being produced in Court which constituted the defendants, &c. and granted them the office of Treasurer of *England*, their Privilege was allowed without putting them to bring a writ of Privilege: the Court grounding themselves on the Record before them. 2 *Show.* 299.

It hath been held, that the Treasurer of the Navy is *eo ipso* an accountant; and that an accountant's Privilege will hold against a special Privilege in another Court, as officer of the Court or otherwise, though it be not alleged, that such an accountant is entered on his account, for that every accountant may be attached by the Court, to make up his account, and must attend for that purpose *de die in diem*. *Hard.* 316. See *Moor* 753: 2 *Inst.* 23. 551: *Bro. Privilege* 16.

In debt in *B. R.* against *J. S.* he pleaded to the jurisdiction, That none of the Privy Chamber ought to be sued in any other Court, without the special licence of the Lord Chamberlain of the household, and that he was one of the Privy Chamber; on demurrer to this plea, the Court overruled it with great resentment, and awarded a *Respondeas ouster*. *Raym.* 34: 1 *Keb.* 137.

It was agreed, that the Privilege of the Court of *C. B.* which Serjeants claimed, extended only to inferior Courts, not to the Courts in *Westminster Hall*; and that a Serjeant may be sued in any of these, because he is not confined to that Court alone, but may practise in any other Court; but it is otherwise as to Attornies or Filasers, who cannot practise in their own name in any other Court but such as they respectively belong to; and that a Serjeant at Law is to be sued by original, not by bill of Privilege. 2 *Lev.* 129: 3 *Keb.* 42: *Moor* 296: *S. C.*

So, in an action by bill brought in *C. B.* against a Serjeant at Law, he pleaded that *he ought to have been sued by original, and not by bill*; and on demurrer, the Court held, that the case of a Serjeant and Prothonotary's Clerk were on the same footing, neither of them being bound to personal attendance, as Prothonotaries and Attornies were, that therefore he ought to have been sued by original; and accordingly gave judgment for the defendant. *Trin.* 7 *G.* 2. Serjeant *Girdler's* case.

J. S. being arrested by a writ out of *C. B.* brought his writ of Privilege as Clerk of the Crown Office; but, it appearing that he was only a Clerk to a Clerk of that Office, and not an *immediate Clerk* of the Office, a *supersedeas* to the writ of Privilege was granted, on

motion; the Court having agreed, that he had no more Privilege than an Attorney's Clerk. 2 *Show.* 287.

A Serjeant at Law, or Barrister, as well as an Attorney, or other privileged person, whose attendance is necessary in *Westminster Hall*, may lay his action in *Middlesex*, though the cause of action accrued in another county; and the Court on the usual affidavit will not change the venue. *Stil.* 460: *Moor* 64: 2 *Show.* 242.

On a motion to discharge a rule which had been obtained for changing the venue, it appeared, that the plaintiff was a Barrister and Master in Chancery: and the Court held that he had Privilege, by reason of his attendance, to lay his action in *Middlesex*, therefore discharged the rule. 2 *Raym.* 1556.

As to the obstructions of public Justice, by means of pretended privileged places, see this Dictionary title *Arrest*. The following is a fuller statement of the statutes there referred to.

By *stat.* 8 & 9 *W. 3. c.* 27. § 15. for preventing the many ill practices used in privileged places to defraud persons of their debts; the pretended Privileges of *White Friars*, the *Savoy*, the *Salisbury Court*, *Ram Alley*, *Mitre Court*, *Fuller's Rents*, *Baldwin's Gardens*, *Montague Close*, the *Minories*, *Mint*, *Clink*, or *Deadman's Place*, are taken away. And the Sheriffs of *London* or their Officers are enabled to take the *posse comitatûs*, and such other power as shall be requisite, and enter such privileged places to make any arrest on legal process, and in case of refusal to break open doors.

The *stat.* 9 *Geo. 1. c.* 28. enacts, That if any person within *Suffolk Place*, or the *Mint*, or the pretended limits thereof, wilfully obstruct persons executing any writ, &c. or abuse any person executing the same, whereby he receive damage or bodily hurt, the person offending shall be transported. And on complaint to three Justices, &c. by any person who shall have a debt owing from any one who resides in the *Mint*, having a legal process taken out for recovery thereof, if the debt be above 50*l.* on oath thereof, the Justices are empowered to issue their warrant to the Sheriff of *Surry*, to raise the *posse*, and to enter the pretended privileged place, and arrest the party, &c. See also *stat.* 11 *Geo. 1. c.* 22, enforcing the above penalties.

II. Is an indictment for treason or felony, trespass, *vi & armis*, assault or riot, process of outlawry shall issue against a Peer; for the suit is for the King, and the offence is a contempt against him; but in civil actions between party and party, regularly a *Capias* or *Exigent* lies not against a Lord of Parliament. 2 *Hal. Hist. P. C.* 199: 2 *Hawk. P. C. c.* 44. § 16. See *post* III. & title *Outlawry*.

If a Peer of Parliament be convicted of a disseisin with force, a *capias pro fine* and *exigent* shall issue; for the fine is given by statute, in which no person is exempted. *Cro. Eliz.* 170: See *Dyer* 314.

So, in debt on an obligation against the Earl of *Lincoln*, who pleaded *non est factum*, which being found against him, the judgment was *ideo capiatur*; on a writ of error brought by him, it was objected that a *capias* does not lie against a Peer; *sed non allocatur*: for by this plea found against him, a fine is due to the King, against whom none shall have any Privilege. *Cro. Eliz.* 503.

An information was exhibited in *B. R.* against the Earl of *Devonshire*, for striking in the King's Palace; which being in time of Parliament, he insisted on his Privilege, and refused to plead in chief,

but sent in his plea of Privilege, to which there was a demurrer and the plea over-ruled, and he was fined 30,000*l.* *Comb.* 49.

Peers are punishable by attachment for contempts in many instances; as for rescuing a person arrested by due course of Law; for proceeding in a cause against the King's writ of prohibition; for discharging other writs, wherein the King's Prerogative, or the liberty of the Subject are nearly concerned; and for other contempts which are of an enormous nature. 2 *Hawk. P. C. c.* 22. § 33.

If a Peer be returned on a Jury, on his bringing a writ of Privilege he may be discharged; also it seems the better opinion, that without such writ he may either challenge himself or be challenged by the party. *Dyer* 314: *Moor* 767: 9 *Co.* 49: *Co. Lit.* 157: 1 *Jon.* 153. See title *Jury*.

So, if a Peer be made Steward of a base Court, or Ranger of a forest, he may, from the dignity of his person, and the presumption that he is engaged in the more weighty affairs of the Commonwealth, exercise these Offices by deputy; though there are no words for this purpose in his creation. 9 *Co.* 49. *a.*

So if a licence be granted to a Peer to hunt in a chase or forest, he may take such a number of attendants with him as are suitable to his dignity. 2 *Co.* 49, *b.*

If a Peer bring an appeal, the defendant shall not be admitted to wage battle, by reason of the dignity of his person. 2 *Hawk. P. C. c.* 45. § 5.

III. THERE are two ways of proceeding against Peers of the Realm and Members of the House of Commons; first, by original writ; and, secondly, by bill. See title *Original*.

The method of proceeding by Original is by Summons, Attachment, and Distress infinite. The Original should issue into that county where the defendant lives; and a copy of it is usually made out by the plaintiff's Attorney for the Sheriff, and served as the *summons* on the defendant. And it is said, that a *Peer* or Peeress, cannot be attached (on civil process,) but should be brought in by summons. Before, or on the *quarto die post* of the return of the Original, the defendant either appears or makes default; for he cannot cast an *esoin*. If he make default, the plaintiff should sue out a *Distringas*, and after that (if necessary) an *alias* or *pluries distringas*; upon which he may move to increase and sell the issues, as before directed. Or if the Sheriff return, upon the *distringas*, &c. that the defendant hath nothing by which he can be distrained, the plaintiff may have a *testatum distringas* into another county.

The *distringas* and other subsequent process upon the Original, state the cause of action at large; and must be made returnable on a general return day, *ubicunque*, or wheresoever the King shall then be in *England*. Each succeeding writ must be teste'd on the *quarto die post* of the return of the preceding one; and there must be fifteen days at least between the teste and return.

If the defendant appear, upon any of these writs, he should enter his appearance with the Filaser; and when the purpose of the writ is thus answered, "the issues (if any have been levied) shall be returned; or, if sold, what shall remain of the money arising by such sale shall be repaid to the party distrained upon." See *stat.* 10 *Geo.* 3. *c.* 50. § 4. But the plaintiff, in such case, is entitled to his costs; and where he had obtained rules for selling the issues levied

upon a *distringas*, *alias*, and *pluries*, and also a rule for an attachment against the Sheriff, but the defendant appeared before any issues had been actually levied; the Court ordered, that upon payment of the costs of issuing the writs, the rules should be discharged; being of opinion, that these costs were not to abide the event of the suit, but were to be paid to the plaintiff immediately; and at all events, whether he should finally succeed in the suit or not.

At Common Law, it was not usual to proceed by bill against Peers of the Realm, or Members of the House of Commons; but now by statute 12 & 13 W. 3. c. 3. extended by *stat.* 10 Geo. 3. c. 50. to Scotland, "Any person or persons, having cause of action against any Knight, Citizen, or Burgess of the House of Commons, or any other person entitled to Privilege of Parliament, may prosecute such Knight, &c. in His Majesty's Courts of King's Bench, Common Pleas, or Exchequer, by summons and distress infinite, or by original bill and summons, attachment and distress infinite, which the said respective Courts are empowered to issue against them, or any of them, until he or they shall enter a common appearance, or file common bail, to the plaintiff's action, according to the course of each respective Court." Since the making of this statute, Peers of the Realm, and Members of the House of Commons, may be sued by bill and summons, &c. as well as by original writ. But this mode of proceeding is not allowed as against unprivileged persons.

The bill against a Peer of the Realm, or Member of the House of Commons, is a complaint in writing, describing the defendant as having Privilege of Parliament; and concludes with a prayer by the plaintiff, of process to be made to him, according to the form of the statute, &c. This bill is filed on stamped parchment, with the Clerk of the Declarations, in the King's Bench Office: and the first process thereon is a writ of Summons; which is a judicial writ, issuing out of the same Office, and directed to the Sheriff of the county where the *venue* is laid, commanding him to summon the defendant. Upon this writ the defendant should be summoned, in like manner as upon the Original; and, if he do not appear at the return of it, is subject to the like process of *Distringas*, &c.

The writ of Summons, and other subsequent process upon the bill, differ from the process by Original, in the following particulars; first, that they do not state the cause of action at large, but only require the defendant to answer the plaintiff, generally, in a plea of trespass on the case, to his damage of, &c. (according to the plea), as he can reasonably shew, that thereof he ought to answer; secondly, that they are teste'd on the very return, and not on the *quarto die post* of the return of each other; thirdly, that they are made returnable on days certain, and not on general return days; and fourthly, that there need not be fifteen days between the teste and return of them.

If the defendant appear, he files common bail; and the plaintiff declares against him. The time of declaring against a Peer of the Realm, or Member of the House of Commons, is the same as in other cases. But there are these differences in the manner of declaring: first, that the declaration by bill begins with a *Memorandum*; and secondly, that in assigning the breach in *Assumpsit*, against a Peer of the Realm, whether by Bill or Original, as well as in the Bill or Original itself, the plaintiff must not charge the defendant with "contriving and fraudulently intending craftily and subtilly to deceive and defraud him;" for the House of Lords have adjudged it a

very high contempt and misdemeanor, to charge a Member of their House with any species of fraud or deceit.

If a Peer, having Privilege of Parliament, be in the King's Bench prison, a declaration may be filed against him, as being in custody of the Marshal, and no summons need be issued. *5 Term Rep. K. B.* 361.

All further proceedings against Peers of the Realm, and Members of the House of Commons, are the same as against other persons; only it should be remembered, that as no *capias* lies against them in civil actions, they cannot be taken in execution; unless where the judgment is obtained upon a statute-staple, or statute-merchant, or upon the statute of *Acton Burnel*; in which cases a *capias* lies, even against Peers of the Realm: And see *ante* II.

The Court of K. B. refused to grant an attachment against a Peer for not paying money awarded, though the defendant consented it should issue on condition it should lie in the Office for a certain time. *Walker v. Grosvenor, (E.) 7 Term Rep. K. B.* 171. And so against a Member of Parliament. *Id.* 448.

Lord *Stourton* brought a bill against Sir *Thomas Meers*, to compel him to a specific performance of articles for purchasing Lord *Stourton's* estate. Sir *Thomas* in his defence insisted, that there were defects in Lord *Stourton's* title to the estate; and it being ordered that Lord *Stourton* should be examined on interrogatories touching his title; it was objected, that Lord *Stourton*, being a Peer, ought to answer on Honour only; but it was ruled by Lord *Harcourt*, that though Privilege did allow a Peer to put in his answer on Honour only, yet this was restrained to an answer; and as to all affidavits, or where a Peer is examined as a witness, he must be on oath; and that this examination on interrogatories, being in a cause wherein his Lordship was plaintiff, to force the execution of an agreement, as his Lordship would have Equity, so he should do Equity; and allow the other side the benefit of a discovery, and that in a legal manner; and accordingly ordered Lord *Stourton* to put in his examination on oath. *1 P. Wms.* 145.

Peers, in suits in Equity, are entitled to a letter missive, which method was introduced on a presumption that Peers would pay obedience to the Chancellor's letter; and is founded on that respect which is due to the Peerage. *Jenk.* 107. If the Lord doth not appear on the letter, a *subpoena*, on motion, is awarded against him; because no subsequent process can be awarded but on a contempt to the Great Seal; and the Chancellor's letter is only *ex gratia*. If, on the service of the *subpoena*, the Peer doth not appear; or if he appears, and does not put in his answer, no attachment can be awarded against him, because *his person cannot be imprisoned*; but the proceedings must be by sequestration, unless cause, &c. and this is regularly made out, on affidavit made of the service of the latter and *subpoena*, though sometimes it is moved for without, since the Peer may shew want of service at the day assigned to shew cause why the sequestration should not issue; and this order for a sequestration is never made absolute *without an affidavit* of the service of the order to shew cause, and a certificate of no cause shewn. *2 Vent.* 342. See title *Chancery*.

A sequestration was granted, unless cause, against Lord *Clifford*, for want of an answer; he afterwards put in an answer, which being reported insufficient, it was moved for a sequestration absolutely, an

insufficient answer being as no answer; but the Court thought it a hardship, in the case of a Peer or Member of the House of Commons, that a sequestration, which in some respects is in nature of an execution, should be the first process against them; therefore allowed, that in case of an answer which is reported insufficient, the plaintiff is to move again *de novo*, for a sequestration *nisi*. 2 *P. Wms.* 385. See 3 *Atk.* 740.

It was moved for a sequestration *nisi*, for want of an answer, against a menial servant of a Peer, as the first process for contempt, in the same manner as in the case of the Peer himself; and though the motion was granted by the Master of the Rolls, yet the Registrar refused to draw it up, as thinking it against the course of the Court; which being moved again before the Chancellor, his Lordship, on reading the *stat.* 12 & 13 *W. 3. c. 3.* likewise granted the motion, it appearing to be both within the meaning and words of the statute; and if it were not so, as it was plain no attachment would lie against their persons, consequently there would be no remedy against them, and they would have a greater privilege than their Lord, if the process against such menial servant were to be a *subpoena*. 1 *P. Wms.* 535.

PRIVILEGED DEBTS. This term is applied to such debts as an executor may pay in preference to all others, such as sick-bed and funeral expences, mournings, servants' wages, &c. See title *Executor*.

PRIVILEGIUM CLERICALE, Or, in common speech, the Benefit of Clergy. See *Clergy, Benefit of*.

PRIVILEGIUM Property propter. A man may have a qualified property in animals *feræ nature*, *propter Privilegium*: that is, he may have the Privilege of hunting, taking and killing them, in exclusion of other persons. 2 *Comm. c. 25. p.* 394. See title *Game*.

PRIVITY, Privitas.] Private familiarity, friendship, inward relation. If there be Lord and tenant, and the tenant holds of the Lord by certain services, there is a Privity between them in respect of the tenure *Cowell*. See title *Privies*.

PRIVY, from the French *privé, familiaris.*] Signifies him who is partaker, or hath an interest in any action or thing; *Old Nat Brev.* 117. See title *Privies*.

PRIVY-COUNCIL.

CONSILIUM REGIS, PRIVATUM CONSILIUM.] A most Honourable Assembly of the King himself and his Privy Counsellors in the King's Court or Palace, for matters of State. 4 *Inst.* 53.

This is the principal Council belonging to the King, and is generally called, by way of eminence. The Council. According to *Coke's* description of it at length, it is a Noble, Honourable, and Reverend Assembly, of the King and such as he wills to be of his Privy Council, in the King's Court or Palace. The King's will is the sole constituent of a Privy Counsellor; and this also regulates their number, which, of antient time, was twelve or thereabouts. Afterwards it increased to so large a number, that it was found inconvenient for secrecy and dispatch; and therefore King *Ch. II.* in 1679 limited it to thirty: whereof fifteen were to be the Principal Officers of State, and those to be counsellors, *virtute officii*; and the other fifteen were composed of ten Lords and five Commoners of the King's choosing. But since that time the number has been much augmented, and now continues indefinite. At the same time also, the antient office of Lord

President of the Council was revived in the person of *Anthony Earl of Shaftesbury*. See title *President of the Council*.

Next to the Lord President of the Council, the Lord Privy Seal sits in Council, the Secretaries of State, and many other Lords and Gentlemen: And in all debates of the Council, the lowest delivers his opinion first, and the King declares his judgment last; and thereby the matter of debate is determined. 4 *Inst.* 55.

No inconvenience now arises from the extension of the number of the Privy Council, as those only attend who are especially summoned for that particular occasion, upon which their advice and assistance are required. *The Cabinet Council*, as it is called, consists of those Ministers of State, who are more immediately honoured with His Majesty's confidence, and who are summoned to consult upon the important and arduous discharge of the Executive Authority: their number and selection depend only on the King's pleasure; and each Member of that Council receives a summons or message for every attendance. 1 *Comm. c. 5. ft. 230. in n.*

Privy Counsellors are made by the King's nomination, without either patent or grant; and on taking the necessary oaths, they become immediately Privy Counsellors, during the life of the King that chooses them, but subject to removal at his discretion.

As to the qualifications of Members to sit at this Board: any natural-born Subject of *England* is capable of being a Member of the Privy Council; taking the proper oaths for security of the Government, and the test for security of the Church. But, in order to prevent any persons under foreign connections from insinuating themselves into this important trust, as happened in the reign of King *William* in many instances, it is enacted by the act of Settlement, Stat. 12 & 13 *W. 3. c. 2.* that no person born out of the dominions of the Crown of *England*, unless born of *English* parents, even though naturalized by Parliament, shall be capable of being of the Privy Council.

The duty of a Privy Counsellor appears from the oath of Office, which consists of seven articles: 1. To advise the King, according to the best of his cunning and discretion. 2. To advise for the King's honour and good of the public, without partiality through affection, love, meed, doubt or dread. 3. To keep the King's Counsel secret. 4. To avoid corruption. 5. To help and strengthen the execution of what shall be there resolved. 6. To withstand all persons who would attempt the contrary. And, lastly, in general, 7. To observe, keep, and do all that a good and true Counsellor ought to do, for his Sovereign Lord. 4 *Inst.* 54.

The Power of the Privy Council is to inquire into all offences against the Government; and to commit the offenders to safe custody, in order to take their trial in some of the Courts of Law. But their jurisdiction herein is only to inquire, and not to punish: and the persons committed by them are entitled to their *Habeas Corpus* by stat. 16 *C. 1. c. 10*; as much as if committed by an ordinary Justice of the Peace. By the same statute the Court of Star-chamber and the Court of Requests, both of which consisted of Privy Counsellors, were dissolved; and it was declared illegal for them to take cognisance of any matter of property, belonging to the Subjects of this kingdom. But, in Plantation or Admiralty causes, which arise out of the jurisdiction of this kingdom; and in matters of lunacy or idiocy, being a special power of the prerogative; with regard to these, al-

though they may eventually involve questions of extensive property, the Privy Council continue to have cognizance, being the Court of Appeal in such cases: or, rather, the Appeal lies to the King's Majesty himself in Council; which is, in fact, a Court of Justice, which must at least consist of three Privy Counsellors. See 3 *P. Wms.* 108: 1 *Comm. c.* 5. Whenever also a question arises between two provinces in *America* or elsewhere, as concerning the extent of their Charters and the like, the King in his Council exercises original jurisdiction therein, upon the principles of feudal Sovereignty. And so likewise when any person claims an island or a province, in the nature of a feudal Principality, by grant from the King or his Ancestors, the determination of that right belongs to His Majesty in Council: as was the case of the Earl of *Derby*, with regard to the Isle of *Man*, in the reign of Queen *Elizabeth*; and the Earl of *Cardigan* and others, as representatives of the Duke of *Montague*, with regard to the Island of *St. Vincent* in 1764. But from all the dominions of the Crown, excepting *Great Britain* and *Ireland*, an appellate jurisdiction (in the last resort) is vested in the same tribunal; which usually exercises its judicial authority in a committee of the whole Privy Council, who hear the allegations and proofs, and make their report to His Majesty in Council, by whom the judgment is finally given. See 3 *Inst.* 182: 4 *Inst.* 53.

The Court of Privy Council cannot decree *in personam* in *England*, unless in certain criminal matters: nor the Court of Chancery *in rem* out of the kingdom. See Lord *Hardwicke's* argument in *Pen v. Baltimore*, where the jurisdiction of the Council and Chancery upon questions arising on subject-matters abroad, is very fully discussed. 1 *Ves.* 444.

The privileges of Privy Counsellors, as such, (abstracted from their honorary precedence, see title *Precedence*,) consist principally in the security which the Law has given them against attempts and conspiracies to destroy their lives. For, by *stat. 3 Hen. 7. c. 14.* if any of the King's servants, of his household, conspire or imagine to take away the life of a Privy Counsellor, it is felony, though nothing be done upon it. The reason of making this statute, *Coke* says, was because such a conspiracy was, just before this Parliament, made by some of King *Henry VII.*'s household servants, and great mischief was like to have ensued thereupon. 3 *Inst.* 38. This extends only to the King's menial servants. But the *stat. 9 Ann. c. 16.* goes further; and enacts, that any person who shall unlawfully attempt to kill, or shall unlawfully assault, and strike, or wound, any Privy Counsellor in the execution of his office, shall be a felon without benefit of clergy. This statute was made upon the daring attempt of the *Sieur Guiscard*, who stabbed Mr. *Hartley*, afterwards Earl of *Oxford*, with a pen-knife, when under examination for high crimes in a Committee of the Privy Council. And antiently if one did strike another in the house of a Privy Counsellor, or in his presence, the party offending was to be fined. 4 *Inst.* 53.

The dissolution of the Privy Council depends upon the King's pleasure; and he may, whenever he thinks proper, discharge any particular member, or the whole of it, and appoint another. By the Common Law also it was dissolved *ipso facto* by the King's demise; as deriving all its authority from him. But now, to prevent the inconveniences of having no Council in being at the accession of a new

Prince, it is enacted by *stat. 6 Ann. c. 7. § 8.* that the Privy Council shall continue for six months after the demise of the Crown, unless sooner determined by the successor. See 1 *Comm. c. 5.*

It is consistent with safety for a Privy Counsellor to give the King counsel when demanded; and the best counsel is ever given to a Prince, when the question is evenly propounded, so as the Counsellor cannot discern which way the King himself inclines; resolution should never precede deliberation, nor execution go before resolution: and when, on debate and deliberation, any matter is well resolved by the Council, a change of it on some private information is neither safe nor honourable. 4 *Inst.*

The Court of Privy Council is of great antiquity: The Government in *England* was originally by the King and Privy Council; though at present the King and Privy Council only intermeddle in matters of complaint on certain emergencies; their constant business being to consult for the public good in affairs of State. 4 *Inst. 53.*

The Lords and Commons assembled in Parliament have often transmitted matters of high concern to the King and Privy Council: And acts of the Privy Council, whether orders or proclamations, were of great authority. *Hen. VIII.* procured an act of Parliament to be made, that, with the advice of his Privy Council, he might set forth proclamations, which should have the force of acts of Parliament; but that statute was repealed in the reign of *Ed. VI.*

Acts of the Privy Council continued of great authority until the reigns of *K. Charles I. and II.:* And by these were controversies sometimes determined touching lands and rights, as well as the suspension of penal Laws, &c. But this seemed to be contrary to *stat. 25 Ed. 3. st. 5. c. 4.* And by *stat. 16 Car. 1. cap. 10. § 5.* it is declared, that neither the King, nor the Privy Council, have authority by petition, &c. to determine or dispose of lands, &c. of any Subject. By 6 *Ann. c. 6.* the Privy Council of *Scotland* was absorbed in the *British* Privy Council: it being in that act provided, that the Queen and her successors should have but one Privy Council in or for the kingdom of *Great Britain:* and that such Privy Council should have the same powers and authorities as the Privy Council of *England* lawfully had used and exercised at the time of the Union with *Scotland,* and none other.—See title *Liberty.*

The King, with advice of his Council, publishes proclamations binding to the Subject: but they are to be consonant to, and in execution of, the Laws of the land.

It is in the power of the Privy Council to inquire into crimes against Government; they may commit persons for Treason, and other offences against the State, in order for their trial in other Courts; and any of the Privy Council may lawfully do it. See title *Commitment I.*

By *stat. 33 Hen. 8. c. 23,* persons examined by the Privy Council, on treasons, &c. done within or without the realm, may be tried before Commissioners of *Oyer and Terminer,* appointed by the King in any county of *England.* This statute, as far as it relates to treason committed within the kingdom, is repealed by *stat. 1 & 2 P. & M. c. 10.* See title *Treason.*

If a person be killed beyond sea, out of the Realm, the fact may be examined by the Privy Council, and the offender tried according to the aforesaid statute. See title *Homicide.*

PRIVY SEAL, *Privatum Sigillum*.] A Seal which the King useth to such grants or things, as pass the Great Seal. 2 *Inst.* 554. See *Keeper of the Privy Seal*.

No protection can be granted under the Privy Seal, but under the Great Seal: But a warrant of the King under the Privy Seal to issue money out of his coffers, is sufficient; though not under the Privy Signet. 2 *Inst.* 555; 2 *Repl.* 17; 2 *Rol. Abr.* 183. The Privy Seal is sometimes used in things of less consequence, that never pass the Great Seal; as to discharge a recognizance, debt, &c. But no writ shall pass under the Privy Seal, which toucheth the Common Law. 2 *Inst.* 555. Matters of the Privy Seal are not issuable, or returnable in any Court, &c. 3 *Nels. Abr.* 211. See title *Grant of the King; Treason*, 7, &c.

PRIVY VERDICT; See title *Jury*.

PRIZES, *Capitio; præda*; from the Fr. *prendre*.] A booty taken from an enemy in time of war: generally applied to the cases of Capture at Sea.

The Prize Courts in the Admiralty, and the Courts of Lords Commissioners of Appeals, have the sole and *exclusive* jurisdiction over the question of Prize or no Prize, and who are the Captors, notwithstanding any of the Prize Acts: and if they pronounce a sentence of condemnation, adjudging also who are the Captors, the Courts of Common Law cannot examine the justice or propriety of it, even though, perhaps, they would have put a different construction on the Prize Acts. And the same Courts have power to enforce their decrees. 4 *Term Repl.* 382. See this Dict. titles *Admiral; Navy; Seamen*; &c.

PRO, A preposition, signifying *for*, or in respect of a thing; as *pro consilio*, &c. And in Law, *pro* in the grant of an annuity *pro consilio*, shewing the cause of the grant, amounts to a condition: But in a feoffment, or lease for life, &c. it is the consideration, and doth not amount to a condition; and the reason of the difference is, because the state of the land by the feoffment is executed, and the grant of the annuity is executory. *Plowd.* 412. See titles *Condition; Grant*.

PROBARE, To claim a thing as a man's own. *Leg. Canut.* c. 44.

PROBATE OF TESTAMENTS, *Probatio Testamentorum*.] The exhibiting and proving Wills and Testaments before the Ecclesiastical Judge, delegated by the Bishop, who is Ordinary of the place where the party dies. If all the deceased's goods, chattels, and debts owing to him, were in the same diocese, then the Bishop of the diocese, &c. hath the Probate of the Testament; but if the goods and chattels were dispersed in divers dioceses, so that there were any thing out of the diocese where the party lived, to make what is called *bona notabilia*, then the Archbishop of *Canterbury*, or *York*, is the Ordinary to make Probate by his prerogative. *Blount*. See title *Executor* V. 3.

The Probate of a will is usually made in the Spiritual Court, and is done by granting letters testamentary to the executor under seal of the Court, by which the executor is enabled to bring any action, &c. And if such letters testamentary are granted to the party who exhibits the will, merely on his oath, by swearing that he believeth it to be the last will of the deceased, this is called proving it in common form; and such a Probate may be controverted at any time but if the

executor, besides his own oath, produces witnesses to prove it to be the last will of the deceased, and this in the presence of the parties who claim any interest, or in their absence, if they are summoned, and do not appear; this is termed a *Probate per testes*, which cannot be questioned after thirty years. 2 *Nels. Abr.* 1301.

On an issue whether the deceased made an executor or no, the Probate of the will was adjudged good proof. 2 *Lill. Abr.* 375. And where the Probate of a will is produced in evidence at a trial, the defendant cannot say that the will was forged, or that the testator was *non compos mentis*; because it is directly against the seal of the Ordinary, in a matter where he had a proper jurisdiction: but the defendant may give in evidence that the seal itself was forged, or that the testator had *bona notabilia*, or he may be relieved on appeal. 1 *Lev.* 235: *Raym.* 405: 1 *Strange* 481. The Probate is evidence only in questions relating to the personal estates; as a will relating to real estate only need not be proved. See title *Will*.

As the judge of the Spiritual Court only can determine the validity of wills for things personal; therefore the Probate of such a will is undeniable evidence to a Jury, and may not be controverted at Common Law. 1 *Ld. Raym.* 262.

A Probate, according to *Holt*, is evidence of a will only as to chattels: but if a will of lands be lost, it shall be allowed for such a will concerning lands. 1 *Ld. Raym.* 731. 735.

When Probate is to be granted of a will, wherein a legacy is interlined in a different hand, and supposed to be forged, the executor has no remedy but in the Spiritual Court; where the will ought to be proved, with a special reservation as to that clause. 1 *P. Wms.* 388.

Notwithstanding appeal from a will, a person is complete executor by the Probate; though the Probate may be traversed, if an executor plaintiff do not conclude with a *profert hic in curiâ*, or the defendant may demand oyer of the will. 3 *Bulst.* 72.

An executor being made by the act of the party deceased, the law entitles him to the Probate of the will, and the Probate cannot be revoked or altered which would in effect make a new will; yet it may be suspended by an appeal: but if administration be granted to one, this is by act of the Court; and if he afterwards become bankrupt, &c. the administration may be repealed. 1 *Roll. Rep.* 226: *Show.* 293: 1 *Salk.* 36: 2 *Nels. Abr.* 1302. See title *Executor* V. 3.

By *stat.* 21 *H. 8. c. 5.* which first settled the fees to be taken by a Registrar and Judge in the Probate of wills, it is enacted, that if the officer takes more than his due fees, he shall forfeit 10*l.* to be divided between the King and party grieved.

The power of granting Probates and administration of the goods of persons dying, for wages or work done in the King's docks and yards, shall be in the Ordinary of the diocese where the person dieth; or in him to whom power is given by such Ordinary, to the exclusion of the Prerogative Court, &c. *Stat.* 4 & 5 *Ann. c. 16.*

By several acts of Parliament, stamps are imposed on the Probates of wills and letters of administration, according to the value of the property of the deceased. By these acts the expence of Probates for the wills of soldiers and sailors is made very small.

PROBATOR, an Accuser, or approver, or one who undertakes to prove a crime charged upon another.

The word was strictly meant of an accomplice in felony, who, to

save himself, confessed the fact, and accused any other principal or accessary against whom he was bound to make good the charge by duel, or trial by the country, and then was pardoned life and members, but yet to suffer transportation. *Bracton: Fleta, lib. 2. c. 52. § 42. 44.* See titles *Accessary; Approver.*

PROCEDENDO, or *Procedendo in loquelâ.*] A writ which lieth where an action is removed from an inferior to a superior Jurisdiction, as the Chancery, King's Bench, or Common Pleas, by *Habeas Corpus, Certiorari*, or writ of privilege; to send down the cause to the Court from whence removed, to proceed on it; it not appearing to the higher Court that the suggestion is sufficiently proved, *F. N. B. 153: 5 Rep. 63.* See *stat. 21 Jac. 1. c. 23.* So, where a cause has been removed from an inferior Court, the Court of K. B. will grant a *Procedendo* if the debt or damages appear to be under 40s. *Tidd's Pract. K. B.*

If the party who sues out the *Habeas Corpus*, or *Certiorari*, doth not put in good bail in time, (where good bail is required) then there goes this writ to the inferior Court to proceed notwithstanding the *Habeas Corpus*, &c. *Rule, Mich. 1654. § 8.*

If a *Certiorari* or *Habeas Corpus*, to remove a cause, be returned before a Judge, the Judge will give a rule thereon to put in good bail, by such a day, which if the defendant, on serving his attorney with a copy of the rule, doth not do, then the Judge will sign a note or warrant for a *Procedendo*, to remove the cause where the action was first laid, unless bail is perfected in four days after service of the rule: Also if bail be put in at the time, and do not prove good, the Judge will grant a rule for better bail to be put in by a certain day, or else to justify the bail already put in: which if defendant doth not do, the Judge will then likewise grant a warrant for a *Procedendo.* *Tidd. Pract. K. B.* See titles *Certiorari; Habeas Corpus.*

Where bail, put in on removal of a cause into *B. R.* is disallowed by the Court, if the defendant on a rule for that purpose, and notice given, refuse to put in better bail, such as the Court shall approve of, a *Procedendo* may be granted; for disallowing the bail makes the defendant in the same condition as if he had put in no bail, and until the bail is put in and filed, the Court is not possessed of the cause so as to proceed in it. *Mich. 24 Car. B. R.*

After a record returned, and the defendant hath filed bail in *B. R.* on a cause being removed, a *Procedendo* ought not to be granted; because by giving and filing bail in this Court, the bail below is discharged. *Sid. 313.*

The *Procedendo* removes the suspension created by the *Habeas Corpus*, and a cause once remanded thereby, cannot afterwards be removed or stayed before judgment. *Stat. 21 Jac. 1. c. 23. § 3.*

This writ may also be awarded when it appears upon the return of the *Habeas Corpus*, that the Court above cannot administer the same justice to the parties, as the Court below. As where an action is brought in *London* on a custom or bye-law, which is only suable there. See titles *Habeas Corpus IV. ad fin.*

Where an *Habeas Corpus* is brought, after interlocutory, and before final, judgment in an inferior Court, and the defendant dies before the return of it, a *Procedendo* shall be awarded; because, by *stat. 8 & 9 W. 3. c. 11.* the plaintiff may have a *scire facias* against the executors, and proceed to judgment, which he cannot have in

another Court: and by this means he would be deprived of the effect of his judgment, which would be unreasonable. *Salk.* 352. So where an action was brought in the Sheriff's Court of London against two partners, and one of them brought a *Habeas Corpus*, and put in bail for himself only, a *Procedendo* was granted; for otherwise the plaintiff would have been disabled from going on in either Court. 1 *Str.* 527.

If an indictment for felony is removed into K. B. from an inferior Court in order to issue process of Outlawry upon it, and the party accused comes in, the Court of K. B. will award a *Procedendo* to carry the record back. 5 *Term Rep. K. B.* 478.

PROCEDENDO ON AID PRAYER. If a man pray in aid of the King, in a real action, and aid be granted; it shall be awarded that he sue to the King in Chancery, and the Justices in the Common Pleas shall stay until the writ of *Procedendo de loquelâ* come to them: And if it appear to the Judges by pleading, or shewing of the party, that the King hath interest in the land, or shall lose rent, &c. there the Court ought to stay until they have from the King a *Procedendo in loquelâ*: and then they may proceed in the plea, until they come to give judgment; when the Justices ought not to proceed to judgment, without a writ for that purpose. So in a personal action, if defendant pray in aid of the King, the Judges are not to proceed till they receive a *Procedendo in loquelâ*. And though they may then proceed and try the issue joined, they shall not give judgment until a writ comes to proceed to judgment. *New Nat. Brev.* 342.

PROCEDENDO AD JUDICIUM; A remedial writ in case of refusal or neglect of justice, which issues out of the Court of Chancery, where Judges of any subordinate Court do delay the parties; for that they will not give judgment, either on the one side or the other, when they ought so to do. In this case a writ of *Procedendo* shall be awarded, commanding them, in the King's name, to proceed to judgment; but without specifying any particular judgment: for that (if erroneous) may be set aside in the course of appeal, or by writ of error, or false judgment: and upon further neglect or refusal the Judges of the inferior Court may be punished for their contempt by writ of attachment, returnable in the Court of King's Bench or Common Pleas. 3 *Comm. c.* 7: *F. N. B.* 153, 154. 240.

If a verdict pass for the plaintiff in assise of novel disseisin before the Justices of assise, and before they give Judgment, by a new commission, new Justices are made; the plaintiff in assise may sue forth a *Certiorari*, directed to the other Justices to remove the record before the new Justices; and another writ to the new Justices to receive and inspect the record, and then proceed to judgment, &c. *New Nat. Brev.* 342, 343.

Where the authority of Commissioners of Oyer and Terminer, &c. or of Justices of the Peace, is suspended by writ of *supersedeas*, their power may be restored by a writ of *Procedendo*. *Regist.* 124: 12 *Ass.* 21: *H. P. C.* 162.

PROCESS.

PROCESSUS; à *procedendo ab initio usque ad finem.*] Is so called, because it proceeds or goes out, upon former matter, either original or judicial; and hath two significations: First, it is largely taken for all the proceedings in any action or prosecution, real or personal, civil or criminal, from the beginning to the end: Secondly, that is

termed the *Process* by which a man is called into any temporal Court; because it is the beginning or principal part thereof, by which the rest is directed; or, taken strictly, it is the proceeding, after the original, before judgment. *Britton* 138: *Lamb. lib.* 4: *Crompt.* 133: 8 *Repts.* 157.

I. *Of Process in civil Cases.*

II. *In criminal Cases.*

I. BLACKSTONE considers Process in civil cases as the means of compelling the defendant to appear in Court. This is sometimes called *original Process*, being founded upon the original writ; and also to distinguish it from *mesne* or intermediate Process, which issues, pending the suit, upon some collateral interlocutory matter; as to summon Juries, Witnesses, and the like. *Finch. L.* 436. *Mesne Process* is also sometimes put in contradistinction to final Process, or Process of execution; and then it signifies all such Process as intervenes between the beginning and end of a suit. 3 *Comm.* c. 19.

Process therefore, as it is now to be considered, is the method taken by the law to compel a compliance with the original writ; of which the primary step is by giving the party *Notice* to obey it. This notice is given upon all real *fræcipes*, and also upon all personal writs for injuries not against the peace, by summons; which is a warning to appear in Court at the return of the original writ, given to the defendant by two of the Sheriff's messengers called *Summoners*, either in person or left at his house or land. *Finch. L.* 436. This warning on the land is given, in real actions, by erecting a white stick or wand on the defendant's grounds. *Dalt. Sher. c.* 31. And by *stat.* 31 *Eliz. c.* 3. the notice must also be proclaimed on some Sunday before the door of the parish church.

If the defendant disobeys this verbal monition, the next Process is by writ of attachment, or *Pone*; so called from the words of the writ, "*pone per vadium et salvos pæligios*:" "Put by gage and safe pledges *A. B.* the defendant, &c." This is a writ not issuing out of Chancery, but out of the Court of Common Pleas, being grounded on the non-appearance of the defendant at the return of the original writ; and thereby the Sheriff is commanded to attach him, by taking gage, that is, certain of his goods, which he shall forfeit if he doth not appear; or by making him find safe pledges or sureties, who shall be amerced in case of his non-appearance. This is also the first and immediate Process, without any previous summons, upon actions of trespass *vi et armis*, or for other injuries, which though not forcible are yet trespasses against the peace, as deceit and conspiracy; where the violence of the wrong requires a more speedy remedy, and therefore the original writ commands the defendant to be at once attached, without any precedent warning. 3 *Comm.* 280.

If, after attachment, the defendant neglects to appear, he not only forfeits this security, but is moreover to be farther compelled by writ of *Distringas*, or distress infinite; which is a subsequent Process issuing from the Court of Common Pleas, commanding the Sheriff to distrain the defendant from time to time, and continually afterwards by taking his goods and the profits of his lands, which are called *issues*; and which by the Common Law he forfeits to the King if he doth not appear. But now the issues may be sold, if the Court shall

so direct, in order to defray the reasonable costs of the plaintiff. *Stat. 10 Geo. 3. c. 50.* See title *Privilege*.

And here, by the Common Law, the Process ended in cases of injury *without force*: the defendant, if he had any substance, being gradually stript of it all by repeated distresses, till he rendered obedience to the King's writ; and if he had no substance, the Law held him incapable of making any satisfaction, and therefore looked upon all farther Process as nugatory: but by degrees the *Capias*, which was originally applied only to cases of injury, accompanied by force, was found to be a convenient remedy in cases merely civil, and was accordingly introduced into practice. If, therefore, a defendant, being summoned or attached, makes default, and neglects to appear; or if the Sheriff returns a *nil*; (i. e. that the defendant hath *nothing* whereby he may be summoned, attached, or distrained;) or taking all or any of these circumstances for granted, the *Capias* now usually issues; being a writ commanding the Sheriff *to take* the body of the defendant and have him in Court at the day of the return. As to the origin and application of this writ in civil suits, see further this Dict. titles *Capias*; *Common Pleas*.

This writ, and all others, subsequent to the original writ, not issuing out of Chancery, but from the Courts into which the original was returnable, and being grounded on what has passed, (or supposed to have passed) in that Court, in consequence of the Sheriff's return, are called *judicial*, and not *original* Writs: they issue under the Private Seal of that Court, and not under the Great Seal of *England*; and are teste'd not in the King's name, but in that of the Chief (or if there be no chief, of the senior) Justice only. And these several writs, when actually grounded on the Sheriff's return, must respectively bear date the same day on which the writ immediately preceding was returnable. See 3 *Comm. c. 19. p. 282.*

Such is the first Process in the Court of Common Pleas: as to the proceeding by *Original quare clausum fregit*; See this Dict. title *Common Pleas*.

In the *King's Bench* they may also, and frequently do, proceed in certain causes, particularly in actions of *Ejectment* and *Trespass*, by original writ, with attachment and *capias* thereon; returnable, not at *Westminster* where the Common Pleas are now fixed in consequence of *Magna Charta*, but *ubicunque fuerimus in Anglia*, wheresoever the King shall then be in *England*; the Court of King's Bench being removeable into any part of *England* at the pleasure and discretion of the Crown. But the more usual method of proceeding therein is without any original, but by a peculiar species of Process called a *bill of Middlesex*: and which is so intitled, because the Court now sits in that county; for if it sate in *Kent*, it would then be a *bill of Kent*. Forthough, as the Justices of this Court have, by its fundamental Constitution, power to determine all offences and trespasses, by the Common Law and custom of the realm, it needed no original writ from the Crown to give it cognizance of any misdemeanor in the county wherein it resides; yet, as by this court's coming into any county, it immediately superseded the ordinary administration of justice by the general commissions of *Eyre* and of *Oyer and Terminer*, a Process of its own became necessary within the county where it sate, to bring in such persons as were accused of committing any forcible injury. The bill of *Middlesex*, (which was formerly always founded on a

plaint of trespass *quare clausum fregit*, entered on the records of the Court,) is a kind of *capias*, directed to the Sheriff of that county, and commanding him to take the defendant, and have him before our Lord the King at *Westminster* on a day prefixed, to answer to the plaintiff of a plea of trespass. For this accusation of trespass it is, that gives the Court of King's Bench jurisdiction in other civil causes; since, when once the defendant is taken into custody of the Marshal, or prison-keeper of this Court, for the supposed trespass, he, being then a prisoner of this Court, may here be prosecuted for any other species of injury. Yet, in order to found this jurisdiction, it is not necessary that the defendant be actually the Marshal's prisoner; for, as soon as he appears, or puts in bail to the Process, he is deemed, by so doing, to be in such custody of the Marshal, as will give the Court a jurisdiction to proceed. And, upon these accounts, in the bill, or Process, a complaint of trespass is always suggested, whatever else may be the real cause of action. This bill of *Middlesex* must be served on the defendant by the Sheriff, if he finds him in that county; but, if he returns "*non est inventus*," then there issues out a writ of *Latitat*, to the Sheriff of another county, as *Berks*; which is similar to the *Testatum Capias* in the Common Pleas, and recites the bill of *Middlesex* and proceedings thereon, and that it is testified that the defendant "*latitat et discurrit*," lurks and wanders about in *Berks*; and therefore commands the Sheriff to take him, and have his body in court on the day of the return. But, as in the Common Pleas the *Testatum capias* may be sued out upon only a supposed, and not an actual, preceding *Capias*; (see title *Capias*;) so in the King's Bench a *Latitat* is usually sued out upon only a supposed, and not an actual, bill of *Middlesex*. So that, in fact, a *Latitat* may be called the first Process in the Court of King's Bench, as the *Testatum Capias* is in the Common Pleas. Yet, as in the Common Pleas, if the defendant lives in the county wherein the action is laid, a common *Capias* suffices; So in the King's Bench likewise, if he lives in *Middlesex*, the Process must be by bill of *Middlesex* only. See further this Dictionary title *Latitat*.

In the *Exchequer* the first Process is by writ of *Quo-minus*, in order to give the Court a jurisdiction over pleas between party and party. In which writ the plaintiff is alleged to be the King's farmer or debtor, and that the defendant hath done him the injury complained of; *quo minus sufficiens existit*, "*by which he is the less able*," to pay the King his rent, or debt. And upon this the defendant may be arrested as upon a *Capias* from the Common Pleas.

Thus differently do the three Courts set out at first, in the commencement of a suit in order to entitle the two Courts of King's Bench and Exchequer to hold plea in causes between subject and subject, which by the original constitution of *Westminster Hall* they were not empowered to do. Afterwards when the cause is once drawn into the respective Courts, the method of pursuing it is pretty much the same in all of them.

If the Sheriff has found the defendant upon any of the former writs, the *Capias*, *Latitat*, &c. he was antiently obliged to take him into custody, in order to produce him in Court upon the return; however small and minute the cause of action might be. For not having obeyed the original summons, he had shewn a contempt of the Court and was no longer to be trusted at large. But when the summons

fell into disuse, and the *Capias* became in fact the first Process, it was thought hard to imprison a man for a contempt which was only supposed: and therefore in common cases by the gradual indulgence of the Courts (at length authorized by *stat. 12 Geo. 1. c. 29.* amended by *stat. 5 Geo. 2. c. 27.* made perpetual by *stat. 21 Geo. 2. c. 3.* and extended to all inferior Courts by *stat. 19 Geo. 3. c. 70.*) the Sheriff or proper officer can now only personally serve the defendant with the copy of the writ or Process, and with notice in writing to appear, by his attorney, in Court, to defend this action; which in effect reduces it to a mere summons. And if the defendant thinks proper to appear upon this notice, his appearance is recorded, and he puts in sureties for his future attendance and obedience; which sureties are called *Common Bail*, being the same two imaginary persons as are pledges for the plaintiff's prosecution, *John Doe* and *Richard Roe*. See title *Pledges*. Or, if the defendant does not appear upon the return of the writ, or within eight days after, exclusive of the return day, the plaintiff may enter an appearance for him, as if he had really appeared in the Common Pleas; and may file common bail in the King's Bench in the defendant's name, and proceed thereupon as if the defendant had done it himself.

But if the plaintiff will make affidavit, or assert upon oath, that the cause of action amounts to 10*l.* or upwards, then he may arrest the defendant, and make him put in substantial sureties for his appearance, called *Special Bail*. In order to which, it is required by *stat. 3 Car. 2. st. 2. c. 2.* that the true cause of action should be expressed in the body of the writ or Process; else no security can be taken in a greater sum than 40*l.* This statute (without any such intention in the makers) had like to have ousted the King's Bench of all its jurisdiction over civil injuries without force; for, as the bill of *Middlesex* was framed only for actions of trespass, a defendant could not be arrested and held to bail thereupon for breaches of civil contracts. But to remedy this inconvenience, the officers of the King's Bench devised a method of adding what is called a clause of *ac etiam* to the usual complaint of trespass: the bill of *Middlesex* commanding the defendant to be brought in to answer the plaintiff of a plea of trespass, *and also* to a bill of debt: the complaint of trespass giving cognizance to the Court, and that of debt authorizing the arrest. In imitation of which the Lord Chief Justice of the Common Pleas a few years afterwards, in order to save the suitors of that Court the trouble and expence of suing out special originals, directed that, besides the usual complaint of breaking the plaintiff's close, a clause of *ac etiam* might also be added to the writ of *Capias*, containing the true cause of action: as, "that the said *Charles* the defendant may answer to the plaintiff of a plea of trespass in breaking his close: and also, *ac etiam*, may answer him, according to the custom of the Court, in a certain plea of trespass upon the case upon promises, to the value of 20*l.*" &c. The sum sworn to by the plaintiff is marked upon the back of the writ; and the Sheriff, or his officer, the bailiff, is then obliged actually to *arrest* or take into custody the body of the defendant; and, having so done, to return the writ with a *cepi corpus* indorsed thereon. See this Dictionary, titles *Arrest; Bail*.

From the foregoing it appears, that Process is only meant to bring the defendant into Court, in order to contest the suit, and abide the

determination of the Law. When he appears, then follow the *Pleadings*, &c. between the parties. See that title.

As to the origin and foundation of the above modes of Process, and of the jurisdiction of the several Courts, see more at large the Introduction to *Crompton's Practice*; and the Appendixes to *Sellon's Practice*, founded on that Introduction.

As to the language of the Process and Records of Law, see this Dictionary, title *Pleading* III; and for further matter, explanatory of the several sorts of writs and Processes, various apposite titles throughout the whole of this work.

Original Process to call persons into Court, &c. must be in the name of the King; and if it issue from the Court of King's Bench, it ought to be under the *teste* of the Chief Justice, or of the senior Judge of the Court, if there be no Chief Justice: and if it issueth from any other Court, it is to be under the *teste* of the first in commission, &c. *Dalt. ch. 132: Finch. 436: Cro. Car. 393.*

If Process is awarded out of a Court, which hath not jurisdiction of the principal cause, it is *coram non judice* and void: and the Sheriff executing it will be a trespasser. 2 *Leon. 89.*

II. THERE is no need of Process on an Indictment, &c. where the defendant is present in Court; but if he hath fled, or secretes himself, in capital cases, or hath not, in smaller misdemeanors, been bound over to appear at the Assises or Sessions, still an indictment may be preferred against him in his absence; since, were he present, he could not be heard before the Grand Jury against it. And, if it be found, then Process must issue to bring him into Court; for the indictment cannot be tried, unless he personally appears: according to the rule of equity in all cases, and the express provision of *stat. 28 Edw. 3. c. 3.* in capital ones, that no man shall be put to death, without being brought to answer by due Process of Law.

No Process shall regularly issue in the King's name, and by his writ to apprehend a felon or other malefactor, unless there be an indictment or matter of record in the Court, upon which the writ issues. 1 *Hale's Hist. P. C. 575.*

The proper Process on an indictment for any petty misdemeanour, or on a penal statute, is a writ of *Venire Facias*, which is in the nature of a summons to cause the party to appear. And if by the return to such *Venire* it appears, that the party hath lands in the county whereby he may be distrained, then a distress infinite shall be issued from time to time till he appears. But if the Sheriff returns that he hath no lands in his bailiwick, then (upon his non-appearance) a writ of *Capias* shall issue, which commands the Sheriff to take his body, and have him at the next assises; and if he cannot be taken upon the first *Capias*, a second and a third shall issue; called an *Alias*, and a *Pluries Capias*. But on indictments for treason or felony, a *Capias* is the first Process; and for treason or homicide, only one shall be allowed to issue, or two in the case of other felonies, by *stat. 25 Edw. 3. c. 14*; though the usage is to issue only one in any felony; the provisions of this statute being in most cases found impracticable. 2 *Hal. P. C. 195.* And so, in the case of misdemeanours, it is now the usual practice for any Judge of the Court of King's Bench, upon certificate of an indictment found, to award a writ of *Capias* immediately in order to bring in the defendant. But if he absconds, and it is

thought proper to pursue him to an outlawry, then a greater exactness is necessary. For, in such case, after the several writs have issued in a regular number, according to the nature of the respective crimes, without any effect, the offender shall be put in the *exigent* in order to his outlawry; that is, he shall be exacted, proclaimed, or required to surrender at five county courts; and if he be returned *quinto exactus*, and does not appear at the fifth exaction or requisition, then he is adjudged to be outlawed, or put out of the protection of the Law; so that he is incapable of taking the benefit of it in any respect, either by bringing actions or otherwise. See *stat. 8 H. 6. c. 10.*; and this Dictionary, title *Outlawry* III.

The punishment for outlawries upon indictments for misdemeanors, is the same as for outlawries upon civil actions; (as to which, and the previous Process by writs of *capias*, *exigi facias*, and proclamation, see this Dictionary, title *Outlawry*; viz. forfeiture of goods and chattels. But an outlawry in treason or felony amounts to a conviction and attainder of the offence charged in the indictment, as much as if the offender had been found guilty by his country. 2 *Hal. P. C.* 205. 4 *Term Rep. K. B.* 521. His life is however still under the protection of the Law, so that though antiently an outlawed felon was said to have *caput lupinum*, and might be knocked on the head like a wolf, by any one that should meet him: because, having renounced all law, he was to be dealt with as in a state of nature, when every one that should find him might slay him: yet now, to avoid such inhumanity, it is holden that no man is entitled to kill him wantonly or wilfully; but in so doing is guilty of murder, unless it happens in the endeavour to apprehend him. 1 *Hal. P. C.* 497: *Bracton*, fol. 125. For any person may arrest an outlaw on a criminal prosecution, either of his own head, or by writ of warrant of *capias utlagatum*, in order to bring him to execution. But such outlawry may be frequently reversed by writ of error; the proceedings therein being (as it is fit they should be) exceedingly nice and circumstantial; and if any single minute point be omitted or misconducted, the whole outlawry is illegal, and may be reversed: upon which reversal the party accused is admitted to plead to, and defend himself against, the Indictment. See further title *Outlawry*, V.

The above is the Process to bring in the offender after indictment found: during which stage of the prosecution it is, that writs of *Certiorari facias* are usually had: though they may be had at any time before trial, to certify and remove the indictment, with all the proceedings thereon, from any inferior Court of criminal jurisdiction into the Court of King's Bench; which is the sovereign ordinary Court of justice in causes criminal. And this is frequently done for one of these four purposes; either, 1. To consider and determine the validity of criminal appeals or indictments, and the proceedings thereon; and to quash or confirm them as there is cause: or, 2. Where it is surmised that a partial or insufficient trial will probably be had in the Court below, the indictment is removed, in order to have the prisoner or defendant tried at the bar of the Court of King's Bench, or before the Justices of *Nisi Prius*: or, 3. It is so removed, in order to plead the King's pardon there: or, 4. To issue Process of outlawry against the offender in those counties or places where the Process of the inferior Judges will not reach him. 2 *Hal. P. C.* 210. Such writ of *Certiorari*, when issued and delivered to the inferior

Court for removing any record or other proceeding, as well upon indictment as otherwise, supersedes the jurisdiction of such inferior Court, and makes all subsequent proceedings therein entirely erroneous and illegal; unless the Court of King's Bench remands the record to the Court below, to be there tried and determined. A *Certiorari* may be granted at the instance of either the prosecutor or the defendant: the former as a matter of right, the latter as a matter of discretion; and therefore it is seldom granted to remove indictments from the Justices of gaol-delivery, or after issue joined, or confession of the fact, in any of the Courts below. 4 *Comm. c.* 24. See this Dictionary, title *Certiorari*.

At this stage of prosecution also it is, that indictments found by the Grand Jury against a Peer must in consequence of a writ of *Certiorari* be certified and transmitted into the Court of Parliament, or into that of the Lord High Steward of *Great Britain*; and that in places of exclusive jurisdiction, as the two Universities, indictments must be delivered (upon challenge and claim of cognizance) to the Courts therein established by charter, and confirmed by act of Parliament, to be there respectively tried and determined. 4 *Comm. c.* 24.

By 48 *Geo. 3. c.* 58, it is enacted, that when any person is charged with any offence (not being Treason or Felony) for which he might be prosecuted by indictment or information in the Court of K. B. upon affidavit thereof made, or on certificate of indictment or information being filed, any Judge of the Court may issue his warrant to apprehend the party, who shall be thereupon held to bail to answer the charge, or on failure of bail shall be committed: and if any person in custody on any such charge for want of bail, shall not plead within eight days after copy of the indictment or information, and notice to plead, are delivered at the gaol, the prosecutor may enter the plea of Not Guilty, and proceed to trial: and the party may be convicted or acquitted as if he had actually appeared. By the same act the powers given by the act 13 *Geo. 3. c.* 31. and 45 *Geo. 3. c.* 92. for executing in *Scotland* the warrants of Justices of Peace in *England*, is extended to warrants issued by any Judge of the Court of King's Bench, as also the Courts of Great Sessions in *Wales*, and any Judge of Oyer and Terminer, or other person having authority to issue such warrant. See the acts 44 *Geo. 3. c.* 92. and 45 *Geo. 3. c.* 92. as to persons committing an offence in one part of the United Kingdom, and who shall go into, reside, or be in any other part of the United Kingdom; and this Dictionary, titles, *Arrest*; *Justices*, &c.

Obstructing the execution of lawful Process, is an offence against public justice, of a very high and presumptuous nature; but more particularly so, when it is an obstruction of an arrest upon criminal Process. And it hath been holden, that the party opposing such arrest becomes thereby *particeps criminis*; that is, an accessory in felony, and a principal in treason. 4 *Comm. c.* 10. *p.* 129. See titles *Arrest*; *Privilege*; *Accessory*; *Misdemeanor*, &c.

PROCESSION. In cathedral and conventual churches, the members had their stated Processions, wherein they walked in their most ornamental habits, with music, singing hymns, and other suitable solemnity: and in every parish, there was a customary annual Procession of the parish priest, the patron of the church, with the chief flag, or holy banner, and the other parishioners, to take a circuit

round the limits of the parish or manor, and pray for a blessing on the fruits of the earth; to which we owe our present custom of perambulation, which in most places is still called *processioning* and *going in Procession*, though we have lost the order and devotion, as well as pomp and superstition of it. See *Perambulation*.

PROCESSUM CONTINUANDO, A writ for the continuance of Process, after the death of the Chief Justice, or other Justices in the commission of *Oyer and Terminer*. *Reg. Orig.* 128.

PROCHEIN AMY, *Proximus amicus*.] The *Next Friend*, or next of kin to a child in his nonage; who in that respect is allowed to deal for the infant in the management of his affairs; as to be his guardian if he holds land in socage, and in the redress of any wrong done him. See *stat. West. 1. 3 Ed. 1. c. 47: West. 2. 13 E. 2. st. 1. c. 15: 2 Inst.* 261; and this Dict. title *Infant V.*

Prochein Amy is commonly taken for guardian in socage; but otherwise it is he who appears in Court for an infant who sues any action, and aids the infant in pursuit of his action: for to sue, an infant may not make an attorney, but the Court will admit the next friend of the infant plaintiff; and a guardian for an infant defendant.

If no guardian is appointed by the father, &c. of an infant, the course of *B. R.* hath been used to allow one of the officers of the Court to be *Prochein Amy* to the infant to sue. *Terms de Ley: 2 Lil. Abr.* 52.

Prochein Amy was never before the statute *Westm. 1.* and was appointed in case of necessity, where an infant was to sue his guardian, or the guardian would not sue for him. *2 Nels. Abr.* 997.

The plaintiff infant may sue by guardian, or by *Prochein Amy*; and if the admission is to sue by Guardian when it should be by *Prochein Amy*, it will be well enough, there being many precedents both ways: but if he is sued, it must be by Guardian. *Cro. Car.* 86. 115: *Hut.* 92.

If an infant be eloiigned or disturbed by his guardian, or any other, so that he cannot bring assise, his *Prochein Amy* shall be admitted. *Stat. 3 Ed. 1. c. 47.* So generally, by *stat. 13 Ed. 1. c. 15.* Since these statutes, the common rule seems to have been that the infant shall sue by *Prochein Amy*, and defendant by Guardian.

To constitute a *Prochein Amy* (or Guardian), the person intended, who is usually some near relation, goes with the infant before a Judge, at his chambers; or else a petition is presented to the Judge on behalf of the infant, stating the nature of the action; or if he is defendant, that he is advised, and believes, he has a good defence thereto; and praying in respect of his infancy, that the person intended may be assigned him as his *Prochein Amy*, or Guardian, to prosecute or defend the action. This petition should be accompanied with an *Agreement*, signifying the assent of the intended *Prochein Amy*, or Guardian: and an affidavit made by some third person, that the petition and agreement were duly signed: On one or other of these grounds, the Judge will grant his *fiat*; upon which a rule or order is drawn up, with the Clerk of the Rules for the admission of the *Prochein Amy*, or Guardian; which admission is either special, to prosecute or defend a particular action, or general, to prosecute or defend all actions whatsoever: though it is said, that by the practice of the Court of King's Bench, a special admission of a Guardian to

appear in one cause, will serve for others. 1 *Str.* 304, 5. See *Tidd's Pract. K. B.*; and *Sellon's Pract.*

PROCHEIN AVOIDANCE, A power to present a minister to a church when it shall become void: as where one hath presented a clerk to a church, and then grants the next Avoidance to another, &c. See titles *Avoidance*; *Advowson*.

PROCLAMATION, *Proclamatio*.] A notice publicly given of any thing, whereof the King thinks fit to advertise his Subjects; and so it is used in *stats.* 7 R. 2. c. 6. See title *King V.* 3.

PROCLAMATION OF COURTS, Is used particularly in the beginning or calling of a Court, and at the discharge or adjourning thereof; for the attendance of persons and despatch of business.

Before a Parliament was dissolved, it was antiently held, that public Proclamation was to be made, that if any person had any petition, he should come in and be heard. *Lex Constitut.* 156. See title *Parliament*.

Proclamation is made in Courts Baron, for persons to come in and claim vacant copyholds, of which the tenants died seised since the last Courts; and the lord may seize a copyhold, if the heir come not in to be admitted on Proclamation, &c. 1 *Lev.* 63. See title *Copyhold*.

PROCLAMATION OF EXIGENTS, On awarding an *Exigent*, in order to outlawry, a writ of Proclamation issues to the Sheriff of the county where the party dwells to make three Proclamations for the defendant to yield himself, or be outlawed. See title *Outlawry III.*

PROCLAMATION OF A FINE, When any fine of land is passed, Proclamation is solemnly made thereof in the court of Common Pleas where levied, after engrossing it: and transcripts are also sent to the Justices of Assise and Justices of the Peace of the county in which the lands lie, to be openly proclaimed there. *Stat.* 1 R. 3. c. 7. See title *Fine of Lands V.*

PROCLAMATION OF NUISANCES, Proclamation is to be made against Nuisances, and for the removal of them, &c. *Stat.* 12 R. 2. c. 13. See title *Nuisance*.

PROCLAMATION OF REBELLION, Is a writ whereby a man not appearing upon a *subjuncta*, or an attachment in the Chancery, is deputed and declared a rebel, if he render not himself by a day assigned. See titles *Commission of Rebellion*; *Chancery*.

PROCLAMATION OF RECUSANTS. A Proclamation whereby Recusants were heretofore convicted, on non-appearance at the assises. See *stats.* 29 *Eliz.* c. 6: 3 *Jac.* 1. cc. 4, 5. and this Dict. title *Papists*.

PRO CONFESSO, Where a bill is exhibited in Chancery, to which the defendant appears, and is afterwards in contempt for not answering; the matter contained in the bill shall be taken as if it were confessed by defendant. *Terms de Ley*.

If a defendant is in custody for contempt in not answering, on a *Habeas Corpus*, which is granted by order of Court to bring him to the bar, the Court assigns him a day to answer; and the day being expired, and no answer put in, a second *Habeas Corpus* is issued, and the party being brought into Court, a further day is assigned; by which day, if he answer not, the bill on the plaintiff's motion shall be taken *pro confesso*, unless cause be shewed by a day; and for want of such cause shewed on motion, the substance of the bill shall be decreed to the plaintiff. *Hill.* 1662. Also after a fourth insufficient an-

swer, the matter of the bill, not sufficiently answered unto by the defendant, shall be taken *pro confesso*, and decreed accordingly.

If in any suit in equity any defendant, against whom any process shall issue, shall not cause his appearance to be entered according to the rules of the Court, in case such process had been served, and affidavit shall be made, that such defendant is beyond the seas; or that, on inquiry at his usual place of abode, he could not be found, so as to be served, and there is just ground to believe that such defendant is gone out of the realm, or absconds to avoid being served; the Court may make an order, appointing the defendant to appear at a day therein to be named, and a copy of such order shall, within fourteen days, be inserted in the *London Gazette*, and published on some Lord's Day, after divine service, in the parish church where the defendant made his usual abode within thirty days next before his absenting; and a copy of such order shall be posted up, *viz.* a copy of such order made in Chancery, Exchequer or Duchy Chamber, shall be posted up at the *Royal Exchange*; and a copy of every such order made in any of the Courts of Equity of the counties palatine, or of the Great Sessions in *Wales*, shall be posted up in some market town within the jurisdiction of the Court, nearest to the place where the defendant made his usual abode, such place of abode being also within the jurisdiction of the Court; and if the defendant do not appear within such time as the Court appoints, then, on proof, made of publication of such order as aforesaid, the Court may order the plaintiff's bill to be taken *pro confesso*, and make such decree as shall be just; and the defendant's estate shall be sequestered: and the Court may order the plaintiff to be paid his demands, out of the estate sequestered according to the decree; such plaintiff giving security, to abide such order touching the restitution of such estate, as the Court shall make on the defendant's appearance. But in case the plaintiff refuse to give security, then the Court shall order the effects sequestered to remain under the direction of the Court, until the appearance of the defendant to defend such suit.—Provided, that this act shall not affect persons beyond the seas, unless affidavit be made of their being in *England* within two years before the *subpœna*: nor extend to Courts having a limited jurisdiction, unless oath be made of personal residence in such jurisdiction one year before the *subpœna*. *Stat. 5 Geo. 2. c. 25.*

It is not sufficient on this statute to make affidavit, that the party making it was informed, and believes, that the defendants withdrew themselves in order to avoid being served with the process of the Court. But it must be likewise sworn by whom the deponent received such information. *Barn. 401.*

A defendant appeared, and stood out to a sequestration, and afterwards, on getting time, put in an answer, which was reported insufficient in near twenty exceptions, and was served with a *subpœna* to make a better answer. The defendant put in another answer, alike insufficient. It was insisted for the defendant, that the practice of taking bills *pro confesso* is not of long standing, the antient way being to put the plaintiff to make proof of the substance of the bill; and that, in this case, taking all the bill *pro confesso*, where part had been sufficiently answered, seemed very strange. But it was answered, that an insufficient answer is as no answer, therefore the whole to be taken *pro confesso*; and the Master of the Rolls decreed for the plain-

tiff; but Lord Chancellor *King*, on an appeal, said, he would consider how matters stood at the time of such decree, and that it was sufficient that there then was an answer, and which the plaintiff had admitted to be so by suing his process for a better; and that so to make the defendant confess the whole bill true, when by the Master's report (which was a record of the same Court) he had answered the greatest part, and when the plaintiff himself had taken the first answer to be an answer in part by serving the defendant with process to put in a better, was against common sense: and reversed the former decree. 2 *P. Wms.* 556.

If, on demurrer to a bill in equity, the defendant obstinately insists on his demurrer, and refuses to answer, where the Court is of opinion, that sufficient matter is alleged in the bill to oblige him to answer, and for the Court to proceed upon, the Court will decree the matter of the plaintiff's bill; for by the demurrer are confessed all matters of fact that are alleged. *Curs. Canc.* 209. See further, title *Chancery*.

PROCTOR, *Procurator*.] He who undertakes to manage another man's cause, in any Court of Civil or Ecclesiastical Law, for his fee: *Qui aliena negotia gerenda suscepit*. A Proctor not to practise, if a Popish recusant. *Stat. 3 Jac. 1. c. 5*. But see title *Papists*. Not to act as Justice of Peace. 5 *Geo. 2. c. 18*. See title *Justices of the Peace*, III.

PROCTORS OF THE CLERGY, *Procuratores Cleri*.] They who are chosen and appointed to appear for cathedral or other collegiate churches; as also for the common Clergy of every diocese, to sit in the Convocation-house in the time of Parliament.

On every new Parliament the King directeth his writ to the Archbishop of each province for the summoning of all Bishops, Deans, Archdeacons, &c. to the convocation, and generally of all the Clergy of his province, assigning them the time and place in the writ; then the Archbishop of *Canterbury*, on his writ received, according to custom directs his letters to the Bishop of *London*, as his provincial Dean, first citing him peremptorily, and then willing him to cite in like manner all the Bishops, &c. and generally all the Clergy of his province, to the place, and against the day prefixed in the writ; but directeth withal, that one Proctor be sent for every cathedral or collegiate church, and two Proctors for the body of the inferior Clergy of each diocese; and by virtue of these letters authentically sealed, the Bishop of *London* directs his like letters severally to the Bishop of every diocese of the province, citing them in like sort, and willing them not only to appear, but also to admonish the Deans and Archdeacons personally to appear; and the cathedral and collegiate churches, and the common Clergy of the diocese, to send their Proctors to the place at the day appointed; and also willeth them to certify to the Archbishop the names of every person so warned by them in a schedule annexed to their letter certificatory: then the Bishops proceed accordingly, and the cathedral and collegiate churches, and the body of the Clergy make choice of their Proctors; which being done and certified to the Bishop, he returneth all at the day. *Cowell*. See title *Convocation*.

PROCONSULES, A name applied to Justices in eyre, or *Justiciarii errantes*, in *England*. *Cowell*.

PROCURATIONS, *Procuraciones*.] Certain sums of money which parish priests pay yearly to the Bishop or Archdeacon, *ratione visitationis*; formerly the visitor demanded a proportion of meat and drink for his refreshment, when he came abroad to do his duty, and examine the state of the church; afterwards these were turned into annual payments of a certain sum, which is called a Procuration, being so much given to the visitor, *ad procurandum cibum & potum*. And complaints were often made of the excessive charges of the Procurations, which were prohibited by several councils and bulls; and that of *Clement IV.* is very particular, wherein mention is made that the Archdeacon of *Richmond*, visiting the diocese, travelled with one hundred and three horses, twenty-one dogs, and three hawks, to the great oppression of religious houses, &c.

A libel was brought in the Spiritual Court for Procurations by the Archdeacon of *York*, setting forth, that for ten or twenty years, &c. there had been due and paid to him so much yearly by a Parson and his predecessors; who suggested for a prohibition, that a duty had been payable, but denied the prescription, and that the Ecclesiastical Court cannot try prescriptions; but it was adjudged, that Procurations are payable of common right, as tithes are, and no action will lie for the same at Common Law; if he had denied the *quantum*, then a prohibition might go. *Raym.* 360. See *stat.* 34 & 35 *H. 8. c.* 19.

These are also called *Proxies*; and it is said there are three sorts of Procurations or Proxies; *ratione visitationis, consuetudinis, & facti*; and that the first is of ecclesiastical cognizance, but the two last are triable at law. *Hardr.* 180.

PROCURATOR, One who hath a charge committed to him by any person; in which general signification it hath been applied to a vicar or lieutenant, who acts instead of another: and we read of *Procurator regni*, and *Procurator reipublicæ*, which is a public magistrate: also Proxies of Lords in Parliament are in our law Books called *Procuratores*: the Bishops are sometimes termed *Procuratores ecclesiarum*; and the advocates of religious houses, who were to solicit the interests, and plead the causes, of the societies, were denominated *Procuratores monasterii*; and from this word comes the common word *Proctor*. It is likewise used for him who gathers the fruits of a benefice for another man; and Procuracy is used in *stat.* 3 *R. 2. c.* 3. for the writing or instrument whereby he is authorised.

PROCURATORES ECCLESIE PAROCHIALIS. The Churchwardens; so called because they were to act as proxies and representatives of the church, for the true honour and interest of it. *Paroch. Antiq.* 562.

PROCURATORIUM, The procuratory, or instrument by which any person or community did constitute or delegate their proctor or proctors, to represent them in any judicial Court or cause.

PROCURATORY OF RESIGNATION. A term in the Law of *Scotland*, by which the vassal authorises the fee to be returned to his superior, either to remain the property of the superior, in which case it is said to be a resignation *ad remanentiam*, or for the purpose of the superior's giving out the fee to a new vassal, or to the former vassal, and a new series of heirs; this is termed a resignation *in favour*. These are analogous to the surrenders of *Copyholds* in *England*. See that title, and title *Tenures*, in this Dictionary.

PRODES HOMMES, A title often given in our old books to the Barons of the Realm, or other military tenants, who were summoned

to the King's Council; *discreti & fideles (probi) homines*, who, according to their prudence and knowledge, were to give their counsel and advice.

PRODITORIE, *Treasonably*.] The technical word in indictments for treason, when indictments were in *Latin*.

PROFANENESS, *Quasi procul à fano*.] A disrespect to the name of God, and to things and persons consecrated to Him. *Wood's Inst.* 396.

Profaneness is punishable by statute; as for reviling the Sacrament of the Lord's Supper, profanely using the name of God in plays, &c. Profaning the Lord's Day; cursing and swearing, &c. See *stats.* 1 *Ed.* 6. c. 1: 1 *Eliz.* c. 1: 3 *Jac.* 1. c. 21: 1 *Car.* 1. c. 1: and this Dictionary, titles *Blasphemy*; *Swearing*; *Sunday*.

PROFER, *Profrum*, vel *proferum*, from the Fr. *proferer*, i. e. *producere*.] The time appointed for the accounts of offices in the exchequer, which is twice in the year. *Stat.* 51 *H.* 3. st. 5.

As to the Profers of Sheriffs, though the certain *debet* of the Sheriff could not be known before the finishing of his accounts; yet it seems there was antiently an estimate made of what his constant charge of the annual revenue amounted to, according to a medium, which was paid into the Exchequer at the return of the writ of summons of the Pipe; and the sums so paid were and are to this day called *Profer vicecomitis*; but although these Profers are paid, if on the conclusion of the Sheriff's accounts, and after allowances and discharges had by him, it appears that there is a surplusage, or that he is charged with more than he could receive, he hath his Profers paid or allowed him again. *Hale's Sher. Account*, 52. See title *Sheriff*.

There is a writ *de attornato vicecomitis pro profro faciendo*. *Reg. Orig.* 139. And we read of Profers in the *stat.* 32 *H.* 8. c. 21; in which place Profer signifies the offer and endeavour to proceed in an action. See *Brit. c.* 28: *Fleta*, lib. 1. c. 38.

PROFER THE HALF-MARK, To offer or tender the Half-mark. See title *Halfmark*.

PROFERT IN CURIA. Where the Plaintiff in an action declares on a deed, or the defendant pleads a deed, he must do it with a *Profert in curia*, to the end that the other party may at his own charges have a copy of it, and until then he is not obliged to answer it. 2 *Lill. Abr.* 382. And if a man pleads by virtue of an indenture, which is lost, on affidavit made thereof, the Court will compel the plaintiff to shew the counterpart, that the defendant may plead thereto; or will grant an imparlance. *Cro. Jac.* 429.

When he who is party or privy in estate or interest, or who justifies in the right of him who is party or privy, pleads a deed; notwithstanding the party privy claims but part of the original estate, yet he must shew the original deed. But where a man is a stranger to a deed, and claims nothing in it, &c. there he may plead the patent or deed, without a *Profert in curia*. 10 *Rep.* 92, 93.

A man may claim under a deed of uses, without shewing it: because the deed doth not belong to him, (though he claims by it), but to the covenantees, and he hath no means to obtain it; and for that it is an estate executed by the statute of uses, so as the party is in by law, like to tenant in dower, or by statute, &c. who may have a rent charge extended, and need not shew the deed. *Cro. Car.* 442. And

in things executed, or Estates determined, there need not be any *Profert in curia*. 3 *Lev.* 204.

No advantage or exceptions shall be taken for want of a *Profert in curia*; but the Court shall give judgment according to the very right of the cause, without regarding any such omission and defect, except the same be specially and particularly set down, and shewn for cause of demurrer. *Stat.* 4 & 5 *Ann. c.* 16. See title *Amendment*; and also *Deed IV*; *Monstrans de fait*; *Oyer*, &c.

PROFESSION, *Professio*.] Was used particularly for the entering into any religious order, &c. This entering into religion, whereby a man was shut up from all the common offices of life, was termed a Civil Death. See 1 *Comm.* 132.

PROFITS. A devise of the Profits of lands, is a devise of the land itself. *Dyer* 210.

A husband deviseth the Profits of his lands to his wife, until his son came of age, this was held to be a devise of the lands until that time: though if the lands were devised to the son, and that his mother should take the profits of it until he came of age, &c. this would give the mother only an authority, not an interest. 2 *Leon.* 221.

By devise of Profits, the lands usually pass; unless there are other words to shew the intention of the testator to be otherwise. *Moor* 753. 758: 2 *Nels. Abr.* 1051. See title *Wills*.

PROFITS OF COURTS. The Profits arising from the King's ordinary Courts of Justice make a branch of his revenue. And these consist not only in fines imposed upon offenders, forfeitures of recognizances and amercements levied on defaulters; but also in certain fees due to the Crown in a variety of legal matters; as for setting the Great Seal to charters, original writs, and other forensic proceedings, and for permitting fines to be levied of lands in order to bar entails, or otherwise to insure titles. As none of these can be done without the immediate intervention of the King, by himself or his officers, the law allows him certain perquisites and profits, as a recompence for the trouble he undertakes for the Public. These in process of time, have been almost all granted out to private persons, or else appropriated to certain particular uses. So that, though our law proceedings are still loaded with their payment, very little of them is now returned into the King's Exchequer; for part of whose royal maintenance they were originally intended. All future grants of them, however, by *stat.* 1 *Ann. st.* 2. *c.* 7. are to endure for no longer time than the life of the Prince who grants them. 4 *Comm. c.* 8. *ft.* 289.

PROHIBITION.

PROHIBITIO.] A Writ to forbid any Court to proceed in any cause there depending, on suggestion that the cognizance thereof belongeth not to the Court. *F. N. B.* 39. But it is now most usually taken for that writ which lieth for one who is impleaded in the *Court-christian*, for a cause belonging to the temporal jurisdiction, or the consueance of the King's Court; whereby as well the party and his counsel, as the judge himself, and the Registrar, are forbidden to proceed any further in that cause. *Corwell*.

The writ of Prohibition is the remedy provided by the Common Law, against the encroachment of jurisdiction; where one is called *coram non iudice*, to answer in a Court that has no legal cognizance of a cause; which is enumerated by *Blackstone* among the grievances cognizable by the Courts of Common Law. See 3 *Comm. cap.* 7.

As all external jurisdiction, whether ecclesiastical or civil, is derived from the Crown, and the administration of justice is committed to a variety of Courts; hence it hath been the care of the Crown, that these Courts keep within the limits and bounds of the several jurisdictions prescribed them; for this purpose the writ of Prohibition was framed; which issues out of the superior Court of Common Law to restrain inferior Courts, whether such Courts be temporal, ecclesiastical, maritime, military, &c. on a suggestion that the cognizance of the matter belongs not to such Courts, and in case they exceed their jurisdiction, the officer who executes the sentence, and in some cases the judge who gives it, are punishable in such superior Courts, sometimes at the suit of the King, sometimes at the suit of the party, sometimes at the suit of both, according to the variety of the case. 2 *Inst.* 601: *F. N. B.* 40: 12 *Co.* 6: 1 *And.* 279: 2 *Jon.* 213: *Skin.* 628.

The reason of Prohibitions in general is, that they preserve the right of the King's Crown and Courts, and the quiet of the Subject; that it is the wisdom and policy of the Law, to suppose both best preserved when every thing runs in its right channel, according to the original jurisdiction of every Court; as by the same reason that one might be allowed to encroach, another might; which would produce nothing but confusion in the administration of justice. *Show. Par. Ca.* 63.

So that Prohibitions do not import that the ecclesiastical or other inferior temporal Courts are *alia* than the King's Courts. but signify that the cause is drawn *ad aliud examen* than it ought to be; therefore it is always said in all Prohibitions. (be the Court ecclesiastical or temporal to which it is awarded,) that the cause is drawn *ad aliud examen contra coronam & dignitatem regiam.* 2 *Inst.* 602: 1 *Roll. Rep.* 252: 3 *Bulst.* 120: *Palm.* 297.

A Prohibition is a writ issuing, properly, out of the Court of King's Bench, being the King's prerogative writ; but, for the furtherance of Justice, it may now also be had, in some cases, out of the Courts of Chancery, Common Pleas, or Exchequer; see *post* I.: It is directed to the Judge and parties of a suit in any inferior Court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other Court. This writ may issue either to inferior Courts of Common Law; as, to the Courts of the Counties palatine or principality of *Wales*, if they hold plea of land or other matters not lying within their respective franchises; to the County Courts, or Courts Baron, where they attempt to hold plea of any matter of the value of 40*s.*: or it may be directed to the Courts-christian, the University Courts, the Court of Chivalry, or the Court of Admiralty, where they concern themselves with any matter not within their jurisdiction; as if the first should attempt to try the validity of a custom pleaded, or the latter a contract made, or to be executed, within this kingdom. Or if, in handling of matters clearly within their cognizance, they transgress the bounds prescribed to them by the laws of *England*; as where they require two witnesses to prove the payment of a legacy, a release of tithes, or the like; in such cases also a Prohibition will be awarded. For, as the fact of signing a release, or of actual payment is not properly a spiritual question, but only allowed to be decided in those Courts, because incident or accessory to some original

question clearly within their jurisdiction, it ought, therefore where the two laws differ, to be decided, not according to the spiritual, but the temporal law; else the same question might be determined different ways, according to the Court in which the suit is depending; an impropriety, which no wise government can or ought to endure, and which is therefore a ground of Prohibition. And if either the Judge or the party shall proceed after such Prohibition, an attachment may be had against them, to punish them for the contempt, at the discretion of the Court that awarded it; and an action will lie against them, to repair the party injured in damages. 3 *Comm. c.* 7. *p.* 112, 113.

So long as the idea continued among the Clergy, that the Ecclesiastical State was wholly independent of the civil, great struggles were constantly maintained between the temporal Courts and the spiritual, concerning the writ of Prohibition and the proper objects of it; even from the time of the constitutions of *Clarendon*, made in opposition to the claims of Archbishop *Becket* in 10 *H. 2.* to the time of exhibiting certain articles of complaint to the King by Archbishop *Bancroft* in 3 *Jac.* 1. on behalf of the Ecclesiastical Courts; from which, and from the answers to them signed by all the Judges of *Westminster Hall*, much may be collected, concerning the reasons of granting, and methods of proceeding upon Prohibitions. See 2 *Inst.* 601—618.

- I. *What Courts may grant a Prohibition; and whether the granting it be discretionary, or ex debito justitiæ.*
- II. *Who have a right to, and may demand, and join in a Prohibition.*
- III. *Of the Suggestion for, and Manner of obtaining a Prohibition; and the Decision of the Court thereon.*
- IV. *In what Cases it may be granted, to inferior Temporal Courts, or Jurisdictions; and at what Time.*
- V. *In what Cases to the Spiritual Courts; and at what Time.*

1. THE Superior Courts of *Westminster*, having a superintendency over all inferior Courts, may in all cases of innovation, &c. award a Prohibition; in this the power of the Court of *B. R.* has never been doubted, being the Superior Common Law Court in the kingdom. *F. N. B.* 53: 4 *Inst.* 71.

Also the Court of Chancery may award a Prohibition; which may issue as well in vacation as in term time, but such writ is returnable into *B. R.* or *C. B. Bro. Prohibition*, *fil.* 6: 4 *Inst.* 81: 1 *P. Wms.* 43. 476.

If one be sued in an inferior Court for a matter out of the jurisdiction, the defendant may either have a Prohibition from one of the Common Law Courts of *Westminster-Hall*; or in regard this may happen in vacation, when only the Chancery is open, he may move that Court for a Prohibition; but then it must appear by oath, that the fact did arise out of the jurisdiction, and that the defendant tendered a foreign plea, which was refused; and if a Prohibition has been granted out of Chancery *improvidè*, and without these circumstances attending it, the Court will grant a *supersedeas* thereto. 1 *P. Wms.* 476.

As the jurisdiction of the Court of *C. B.* is founded on original writs issuing out of Chancery, it hath been doubted, whether this Court could, without writ or plea depending, award a Prohibition; but

this point has been determined, *viz.* that this Court may on a suggestion grant Prohibitions, to keep as well Temporal as Ecclesiastical Courts within their jurisdiction, and that without any original writ or plea depending; the Common Law being, in these cases, a Prohibition of itself, and standing instead of an original. *Bro. Prohibition, fol. 6: Noy 153: 12 Co. 58. 108: Bro. Consultation, fol. 3: 4 Inst. 99: 2 Brownl. 17.*

Accordingly it hath been adjudged, that a Prohibition ought to be granted by *C. B.* to the Court of Delegates, for suing there to avoid the institution of a clerk to a church in *Lancashire*, after induction; though the *quare impedit* for the church could not be brought in *C. B.* but only in the county of *Lancaster*; because the title of the advowson was not questioned by this Prohibition, but the intrusion on the Common Law, of which this Court has special care. *Moor 861: 2 Rol. Abr. 317: Hob. 15.*

But as to the Courts of *B. R.* and *C. B.* this difference hath been made. That in the first of those Courts a Prohibition may be awarded on a bare surmise, without any suggestion on record; and such writ is only in nature of a commission prohibitory, which is discontinued by demise of the King; but that as to a Prohibition issuing out of *C. B.* the suggestion must be on record, therefore is considered as the suit of the party, and in which he may be nonsuited, and is not discontinued by demise of the King. *Noy 77: Palm. 422: Latch. 114.* Yet, if insisted on, a prosecution cannot be moved for in *B. R.* till the suggestion be entered on the roll. And indeed it is the constant practice, to enter the suggestion on the roll, and to leave a copy thereof with the clerk of the papers, previous to the motion. See 1 *Salk. 136.*

The Court of *C. B.* has no power to issue an original writ of Prohibition to restrain a Bishop from committing waste in the possessions of his See: at least at the suit of an uninterested person. Query if any Court of Common Law has that power: and if the Court of Chancery has not? 1 *Bos. & Pul. 105.*

If the King's farmer, or copyholder of the King's manor, be sued in the Ecclesiastical Court, for tithes, on a suggestion in the Court of Exchequer that he prescribes to pay a certain *modus* in lieu of tithes, he shall have a Prohibition, and such *modus* shall be tried there. *Palm. 523—5: Lane 39: 1 Roll. Abr. 539.*

The Grand Sessions of *North Wales* may send a Prohibition, and write to the Spiritual Courts there. 1 *Sid. 92.* but for this see *Cro. Car. 341: 1 Jon. 330: Vaugh. 411.*

It is laid down, that though a surmise be a matter of fact, and triable by a Jury, yet it is in the discretion of the Court to deny a Prohibition, when it appears to them that the surmise is not true. *Hob. 67.*

But it hath been held, that awarding a Prohibition is a matter discretionary: that is, that from the circumstances of the case, the superior Courts are at liberty to exercise a legal discretion therein; but not an arbitrary one in refusing Prohibition, where in such like cases they have been granted, or where by Law they ought to be granted. *Winch. 78.*

It hath been determined in the House of Lords, that no writ of error will lie on the refusal of a Prohibition; but when a consultation

is awarded, it is within an *ideo consideratum est*, and then a writ of error will lie. 1 *Ld. Raym.* 545.

If the master of a ship sues in the Admiralty for his wages, and a Prohibition is moved for, on a suggestion that the contract was made on land, and the Court is of opinion that a Prohibition ought to be granted; in this case they will not compel the party to find special bail to the action in the Court above. *Salk.* 33: *Carth.* 518: *Cum.* 74: 1 *Ld. Raym.* 576.

If there is judgment against a simonist, who by the assent of parties is to continue for a certain time on the benefice, and who at the expiration of the time refuses to remove, but commits waste, a Prohibition to stay waste may be had by the patron, incumbent, or any other person, because that is the King's writ; and any one may pray a Prohibition for the King, and it is grantable *ex debito justitiæ*, and not in the discretion of the Court. 1 *Sid.* 65: *Hob.* 247.

II. THE KING may sue for a Prohibition, though the plea in the Spiritual Court be between two common persons; because the suit is in derogation of his Crown and dignity. *F. N. B.* 40.

If the Ecclesiastical Court hold plea of any matter which belongs not to their jurisdiction, it has been already stated, that, on information thereof to the King's Courts, a Prohibition will issue. 2 *Inst.* 607. And if a man libels in the Spiritual Court for a matter which does not appertain to that Court, but to the Common Law, as a matter of frank-tenement; yet he himself, against his own suit, may pray a Prohibition, and have it. 2 *Roll. Abr.* 312: 1 *Leon.* 130: *Goulds.* 149. 12 *Co.* 56.

So, where the plaintiff in the Spiritual Court brought a Prohibition to stay his own suit there, for that he suing for tithes by virtue of a lease made by the vicar of *A.* for three years, the defendant claimed to be discharged of tithes by a former lease and composition by deed; and in this case it was held, that the plaintiff himself may have a Prohibition to stay the suit; for the ecclesiastical Judges are not to meddle with the trial of leases or real contracts, though they have jurisdiction of the original cause, (*viz.* the tithes); for the lease is in the realty, and is not merely accidental; and it makes no difference, that the plaintiff brings Prohibition to stay his own suit; for if the Temporal Court has knowledge by any means, that the Spiritual Court meddles with temporal trials, a Prohibition ought to be awarded. *Cro. Jac.* 351: 2 *Bulst.* 283: *Litt. Rep.* 20.

If a vicar sues a parishioner for tithes in the Spiritual Court, and the parson appropriate appears there *pro interesse suo*, and prays a Prohibition, it shall be granted. 2 *Roll. Abr.* 312: *Cro. Eliz.* 251: *Keilw.* 110.

If lessee for years is sued in the Spiritual Court for tithes, he in reversion may have a Prohibition. *Moor.* 915: *Cro. Eliz.* 55.

But no man is entitled to a Prohibition, unless he is in danger of being injured by some suit actually depending; therefore, on a petition to the Archbishop, or other Ecclesiastical Judge, no Prohibition lies. *March* 22. 45. A Prohibition *quia timet* does not lie. *Allen* 56.

If several libels are exhibited against *A.* and *B.* in a matter in which the Court hath not conusance, *A.* and *B.* cannot join in a Prohibition; so if the griefs be several, as some books say. *Noy* 131: 1 *Leon.* 286: *Cro. Car.* 129.

But where the vicar of *A.* libelled several persons severally, for tithes, who joined in a Prohibition, suggesting a *modus*; though the Court held in this case, that the Prohibition was not regularly brought, being in all their names, when there were several libels; yet inasmuch as this was on a custom, and matter triable at Common Law, in which the Ecclesiastical Court was properly prohibited, though not in exact form, they refused to award a consultation; but directed that the parties should put in several declarations, as if there had been several Prohibitions. *Yelv.* 128—9; *Owen* 13.

So if *A.* libels against *B.* and *C.* for defamation, and they sue a Prohibition, they shall join in attachment on it; and it is no objection to say, that the defamation was several. 1 *Ld. Raym.* 127; and see 1 *Vent.* 266; *Raym.* 425; *Comb.* 448.

Where two or more are allowed to join in a Prohibition, and one dies, the writ shall not abate; because nothing is to be recovered; they are only to be discharged. *Owen* 13.

III. THE PARTY aggrieved in the Court below applies to the superior Court, setting forth, in a suggestion upon record, the nature and cause of his complaint, in being drawn *ad aliud examen*, by a jurisdiction or manner of process disallowed by the laws of the kingdom: upon which, if the matter alleged appears to the Court to be sufficient, the writ of Prohibition immediately issues; commanding the Judge not to hold, and the party not to prosecute, the plea.

But sometimes the point may be too nice and doubtful to be decided merely upon a motion: and then, for the more solemn determination of the question, the party applying for the Prohibition is directed by the Court to declare in Prohibition; that is, to prosecute an action, by filing a declaration, against the other, upon a supposition or fiction (which is not traversable) that he has proceeded in the suit below, notwithstanding the writ of Prohibition. And if, upon demurrer and argument, the Court shall finally be of opinion, that the matter suggested is a good and sufficient ground of Prohibition in point of law, then judgment with nominal damages shall be given for the party complaining, and the defendant, and also the inferior Court, shall be prohibited from proceeding any farther. On the other hand, if the superior Court shall think it no competent ground for restraining the inferior jurisdiction, then judgment shall be given against him who applied for the Prohibition in the Court above, and a writ of *consultation* shall be awarded; so called, because, upon deliberation and consultation had, the judges find the Prohibition to be illfounded, and therefore by this writ they return the cause to its original jurisdiction, to be there determined, in the inferior Court. 3 *Comm. c.* 7: 2 *H. Black. Rep.* 533.

Leave to declare in Prohibition will be granted only when the Court inclines to prohibit, not when it inclines to the contrary. 1 *Black. Rep.* 81: *Doug.* 620. (528).—The party applying for a Prohibition has no right to insist on declaring; when the Court is satisfied that his application is groundless; but the defendant in Prohibition may, when the opinion of the Court is against him. 1 *Burr.* 198.

Even in ordinary cases, the writ of Prohibition is not absolutely final and conclusive. For, though the ground be a proper one in point of law, for granting the Prohibition, yet, if the fact that gave rise to it be afterwards falsified, the cause shall be remanded to the

prior jurisdiction. If, for instance, a custom be pleaded in the Spiritual Court, a Prohibition ought to go, because that Court has no authority to try it; but, if the fact of such a custom be brought to a competent trial, and be there found false, a writ of consultation will be granted. For this purpose the party prohibited may appear to the Prohibition, and take a declaration, (which must always pursue the suggestion,) and so plead to issue upon it; denying the contempt, and traversing the custom upon which the Prohibition was grounded: and, if that issue be found for the defendant, he shall then have a writ of consultation.

The writ of consultation may also be, and is frequently, granted by the Court without any action brought; when, after a Prohibition issued, upon more mature consideration the Court are of opinion that the matter suggested is not a good and sufficient ground to stop the proceedings below. 3 *Comm. c. 7.*

Where the matter suggested for a Prohibition appears on the face of the libel, to be out of the jurisdiction of the Inferior Court, an affidavit of the truth of the suggestion, is never insisted on; but if it does not appear on the face of the libel, or if a Prohibition is moved for, for more than appears on the face of the libel, to be out of their jurisdiction, there ought to be an affidavit. 2 *Salk. 549: 1 P. Wms. 65. 477: Andr. 304.*

The suggestion in the Temporal Courts may be traversed. 2 *Inst. 611: 2 Co. 44: Moor 525.*

On a rule to shew cause, why a Prohibition should not be granted, to stay a suit in the Court of the Archdeacon of *Litchfield*, against one for not going to church, nor receiving the sacrament thrice a year, on suggestion of the statute of *Eliz.* and Toleration Act, and then qualifying himself within the act, and alleging, that he pleaded it below, and they refused to receive his plea; cause was shewn, that this fact was false, and that the plaintiff was not a Dissenter, nor had qualified himself *ut supra*, and that there was no affidavit of the fact by the plaintiff; by which means any person might come and suggest a false fact, and oust the Spiritual Court of their jurisdiction; which the Court admitted, therefore for want of such affidavit the rule was discharged. 1 *Ld. Raym. 1211.*

If a plea to an inferior jurisdiction be properly tendered, which they refuse, though this be a good cause for a Prohibition, yet an affidavit must be made of the refusal. *Skin. 20: Hard. 406: 3 Keb. 217.*

A motion was made for a Prohibition to the Ecclesiastical Court of *London*, for calling a woman *whore*, on a suggestion that the words were actionable there by the custom of the place; but the Court would not grant a Prohibition without oath made, that if any such words were spoken, it was in *London*, and not elsewhere. 4 *Mod. 367.*

On a libel for calling the plaintiff old thief and old whore; the defendant suggested for a Prohibition, that if any such words were spoken, they were spoken at the same time; but this suggestion was held ill, because the words ought to have been fully confessed. 1 *Vent. 10.*

By *stat. 2 & 3 Ed. 6. c. 13.* it is enacted, "That if, in cases of suits in the Ecclesiastical Court for *Tithes*, any party sue for any Prohibition, that then the same party, before any Prohibition shall be granted, shall bring and deliver to the hands of some of the Judges of the same Court, where such party demanded Prohibition, the very true

copy of the libel depending in the Ecclesiastical Court, concerning the matter where the party demandeth Prohibition, subscribed with the hand of the same party;" and under the copy of the libel shall be written the suggestion, wherefore the party demandeth the Prohibition; and in case the suggestion, by two witnesses at the least, be not proved true, in the Court where the Prohibition shall be granted, then the party that is hindered of his suit in the Ecclesiastical Court by such Prohibition, shall, on his request, without delay have a consultation granted in the same case, in the Court where the Prohibition was granted; and shall recover double costs and damages against the party that so pursued the Prohibition; the costs and damages to be assessed by the Court where the consultation shall be granted; for which costs and damages the party to whom they shall be awarded may have an action of debt by bill, plaint, or information, in any Court of Record. See *stats. 27 H. 8. c. 20; 32 H. 8. c. 7.* to which this act refers.

In the construction of the above-mentioned statute the following opinions have been holden.

That this statute, referring to *stats. 27 H. 8. c. 20; 32 H. 8. c. 7;* which extend to tithes and offerings generally, all such tithes and church duties as are mentioned in those statutes are as much within this act as if particularly enumerated. *2 Inst. 662; Dyer 170. b.*

Therefore it extends to Prohibitions to suits of small tithes as well as great. *Yelv. 102; 2 Ld. Raym. 1172.*

So it hath been adjudged, that the suggestion of a *modus decimandi* ought to be proved within six months, being within the act. *Noy 148; Yelv. 104.*

So where one, who was sued for tithe of hay in the Spiritual Court, suggested for a Prohibition, that he was to pay so much on an arbitrament; and it was held, that this suggestion ought to be proved, as well as one made of a *modus decimandi*: so on a suggestion on the *stat. 31 H. 8. c. 13. § 21.* that lands are tithe-free; because the clause requiring the proof of a suggestion, is general, and not limited to real composition. *1 Roll. Ref. 55.*

So on a suggestion, that the suit in the Spiritual Court was for tithes of heath and barren ground improved, within seven years after the improvement, contrary to the statute; in this case proof of the suggestion within six months was held necessary. *1 Jon. 231; Cro. Car. 208.*

But it hath been held, that there needs no proof of the suggestion where the suit is for tithes contrary to common right, or where the contract of the party is suggested. *Comb. 147.*

It hath been held, that the suggestion need not be proved strictly, nor with precise certainty as to all its circumstances; but that if it be proved in substance, or in such a manner as to shew that the Ecclesiastical Court has not jurisdiction, it is sufficient. *Cro. Eliz. 736; Moor 911.*

The suggestion must be proved by honest and sufficient witnesses, which is required by the express words of the statute; therefore the testimony of one attainted of felony, excommunicated or convicted of recusancy, is, as in other cases, to be rejected. *2 Bulst. 154.*

But it hath been held, that persons such as parishioners, &c. who may not be sufficient and able witnesses at a trial at Law, may notwithstanding be sufficient witnesses to prove the suggestion;

the chief intent of the statute being to prevent vexatious suggestions; also it hath been held, that after the admitting and recording the proof of the suggestion, nothing is to be objected against the persons of the evidence. *Mich.* 27 *Car.* 2. in *C. B.*

If a suggestion consists of two parts, it is said to be sufficient to produce one witness to one, and another to another. 1 *Vent.* 107.

It hath been held, that the six months, for proof of the surmise, shall be accounted according to the calendar; for that this being a computation which concerns the church, it is but reasonable that it should be done according to the computation used in the Ecclesiastical Law. *Hob.* 197: *Lit. Rep.* 19: 2 *Mod.* 58.

It is said, that the time of six months, given by the statute to prove the suggestion, ought to be intended six months in term time, and that the vacation should be no part of the time; but this hath been since adjudged otherwise, and that the time shall commence from the *teste* of the writ of Prohibition, and not from the time of the rule made for awarding it. *Moor* 573: *Noy* 30: 2 *Ld. Raym.* 1172: 2 *Salk.* 554.

If the surmise be proved before one of the Judges within the six months, although it be not recorded till after the six months by the Court, it is well enough. *Noy* 30. It must be entered in the office. 2 *Show.* 308.

It hath been held, that proof which is not sufficient, may be supplied by better proof within the six months, but not after. *Litt. Rep.* 155.

The party on failure of proof of the suggestion, shall not only have double costs and damages, but also his costs and damages in the action he brings for recovery of them. *Bendl.* 143. See *stat.* 8 & 9 *W.* 3. c. 11. § 3; and this Dictionary, title *Costs*.

But if the Prohibition be grounded partly on a *modus*, which needs no proof, and partly on the contract of the parties which doth need proof, there ought not to be double costs; for mixing the contract with the manner of tithing privileges the whole. *Brownl.* 99: *Yelv.* 119.

So, where for a variance between the libel and suggestion, a consultation was awarded, and double costs adjudged to the defendant; this was held to be error by the very letter of the statute, which gives double costs only for want of proving the suggestion, and for no other cause. *Yelv.* 79, 80.

So, where a Prohibition was obtained, on a suggestion which was not proved within the six mouths, in which the defendant took issue with the plaintiff, which was found for the plaintiff; in this case it was resolved, that the defendant should not have double costs for want of the suggestion's being proved; for the statute is, that he shall have a consultation and double costs; but in this case he could not have a consultation, the matter in issue being found against him; but ought to have prayed a consultation on the suggestion not being proved, and then should have had his double costs. *Latch.* 140.

The surmise or suggestion may be brought in by attorney, and need not be in proper person. 1 *Leon.* 286.

A prohibition is not to be granted the last day of term; but on motion a rule may be obtained to stay proceedings till the ensuing term. *Latch.* 7: 3 *Roll. Rep.* 456.

By *stat.* 50 *E.* 3. c. 4. no Prohibition shall go after a consultation;

unless the libel be enlarged, or otherwise changed. And therefore, regularly, where a consultation is awarded upon the merits, the party shall not have another Prohibition on the same suggestion. But if a consultation is awarded, for want of form in the suggestion or proceeding thereon, another Prohibition may be allowed; or if a consultation goes for a collateral matter, as if the plaintiff is nonsuited. So if a consultation goes, and the party against whom it is granted, appeals, the appellee may have a Prohibition, though the appellants cannot. So, if after consultation the plaintiff pleads the same matter (which was suggested and found against him at Common Law) in the Spiritual Court, which is accepted, and proceeds there for trial, the former defendant may have a new Prohibition. See *Com. Dig.* title *Prohibition* (K. 3.)

A suggestion for Prohibition begins thus;

BE IT REMEMBERED, *That on, &c. comes before our Lord the King at Westminster, C. D. in his proper person, and gives this Court here to understand and be informed, That whereas A. B. &c. (setting forth the complaint and proceeding in the other Court) contrary to the laws and customs of the kingdom: Wherefore the said C. imploring the aid of this Honourable Court, before the King himself, prayeth to be relieved, and that he may have his Majesty's writ of Prohibition, directed to the Judge of the said Court, &c. to prohibit him and them from taking any further cognizance of the said plea before them, touching or concerning the premises: And it is granted him accordingly, &c.*

The common form of a Prohibition runs thus:

GEORGE, &c. To A. B. &c. Greeting. *We prohibit you, that you hold not plea in the Court, &c. of, &c. whereof C. D. complains, that E. F. draws him into plea before you, &c. And to the party himself; We prohibit or forbid you E. F. that you follow not the plea in the Court of, &c. whereof C. D. complains, that you draw him into the Court, &c.*

IV. A PROHIBITION doth lie as well to a Temporal Court as to the spiritual, Court of Admiralty, or other Court, whose proceedings are different from those in the Superior Courts of Common Law; if such Temporal Court exceed the bounds of its jurisdiction, or take cognizance of matters not arising within its jurisdiction. *F. N. B.* 45: 2 *Inst.* 229. 243. 601: 2 *Roll. Rep.* 379: 1 *Roll. Rep.* 252: 2 *H. Blackst.* 100—107: 533: 6 *Parl. Cases* (8vo) 203.

A Prohibition lies to a Court of Appeal, where it appears they have no jurisdiction over the subject: even after they have remitted the suit to the Court below, and awarded costs against the appellant, and though the party applying for the Prohibition be the appellant, 1 *Term Rep.* 552. See *post.* V. and *Com. Dig.* title *Prohibition* D. as to the time when a Prohibition shall be granted.

If trespass *vi & armis* be brought in the County-court, a Prohibition lies for the Plaintiff. *F. N. B.* 47.

So if one sueth another in a Court-Baron or other Court, which is not a Court of Record, for charters concerning inheritance or freehold, he shall have a Prohibition. *F. N. B.* 47.

A person having obtained judgment in *B. R.* for his debt and damages, brought action for recovery of them against the bail in the

Court of the *Tower of London*, in which action the party was taken on a *capias*, and was rescued, after which the plaintiff brought his action on the case in that Court for the rescue; and all this appearing to the Court of *B. R.* they granted a Prohibition. 1 *Rol. Rep.* 54.

So where an action of debt was brought in the *Marshalsea*, on a judgment in *B. R.* a Prohibition was granted. 2 *Salk.* 439.

A suit was surmised to be before the Lord President of the *Marches*, for an office, between the grantee of the Lord President and a stranger, wherein the only question would be, whether the grant of that office belonged to the Lord President; and because in this case he would be as it were both judge and party, a Prohibition was granted. 1 *Keb.* 648.

If there be one entire contract above 40*s.* and a man sues for it in a Court Baron, severing it into small sums under 40*s.* a Prohibition shall be granted, because this is done to defraud the Court of the King. 19 *Hen.* 6. 54: 2 *Rol. Abr.* 280: *F. N. B.* 46.

An action was brought in the Hundred Court for 40*s.* in which the plaintiff confessed that he was satisfied one shilling, which being done with an intent to give that Court jurisdiction, and to defraud the superior Courts, a Prohibition was granted. *Palm.* 564.

If there be several contracts between *A.* and *B.* at several times for divers sums, each under 40*s.* but amounting in the whole to a sum sufficient to entitle the superior Court to a jurisdiction, they shall be sued for in such superior, and not in an inferior Court, which is not of record. 1 *Vent.* 65.

So in a Prohibition to the Court of the Honour of *Eye*, where the case was; one contracted with another for divers parcels of malt, the money to be paid for each parcel being under 40*s.* he levied divers complaints thereupon in the said Court; wherefore the Court of *K. B.* granted a Prohibition; because though there be several contracts, yet as the plaintiff might have joined them all in one action, he ought to have so done, and sued in *B. R.*; and not put the defendant to unnecessary vexation; any more than he can split an entire debt into divers, to give the inferior Court jurisdiction *in fraudem legis*. 1 *Vent.* 73: 2 *Keb.* 617: 1 *Show.* 11.

It is laid down by *Coke*, and admitted in a variety of cases, that no inferior Court can hold plea of any transitory action, if not made within the jurisdiction, and that the cause of action must be alleged to arise within such jurisdiction. 2 *Inst.* 231: 1 *Saund.* 74: 2 *Jon.* 230: 1 *Show.* 10: and see titles *Courts*; *County Court*.

Therefore, in an action on a promise in an inferior Court, not only the promise, but the consideration must be alleged to arise within the inferior jurisdiction, and must be so proved on the trial. 1 *Rol. Abr.* 545.

But if the plaintiff had shewn that the money had been lent within the Jurisdiction of the Court, or if it had been for goods there sold, the plaintiff would have had no need to say, that the defendant assumed to pay within the jurisdiction; because the law creates the promise on the creation of the debt, which debt being within the jurisdiction, the promise shall be intended there also. *Ld. Raym.* 211.

In all cases where inferior Courts assume a jurisdiction, or hold plea of a matter not arising within their limits, the party hath his remedy, and may stay their proceedings by Prohibition; but such Prohibition can only regularly be obtained by its appearing, on oath

made, that the fact did arise out of the jurisdiction, and that the defendant tendered a foreign plea; which was refused. 6 *Mod.* 146. *Carth.* 402: 1 *Salk.* 201: 1 *P. Wms.* 476.

In the case of *Mendyke v. Stint* it was greatly insisted upon, that though the party neglected to plead to the jurisdiction, yet the matter arising out of the inferior jurisdiction, the superior Courts ought to grant a Prohibition; for otherwise the parties, their counsel, and attorneys, would give a jurisdiction to inferior Courts which they were not entitled to by law; but it was otherwise adjudged; and it seems to be now agreed, that after admitting the jurisdiction, or after imparlance, the party cannot apply for a Prohibition. 2 *Mod.* 271.

But these things were agreed by the Court.

If any matter appears in the declaration, which sheweth that the cause of action did not arise within the jurisdiction, there a Prohibition may be granted at any time. If the subject matter in the declaration be not proper for the judgment and determination of such Court, there also a Prohibition may be granted at any time. If the defendant, who intended to plead to the jurisdiction, is prevented by any artifice, as by giving a short day, or by the Attorney's refusing to plead it, &c. or if his plea be not accepted, or is over-ruled; in all these cases a Prohibition likewise will lie at any time. 2 *Mod.* 273.

When the spiritual Court incidentally determines any matter of Common Law cognizance, such as the construction of an act of Parliament, otherwise than as the Common Law requires, Prohibition lies after sentence: although the objection do not appear on the face of the libel, but is collected from the whole of the proceedings in the Spiritual Court. 3 *East's Rep.* 472: 5 *East's Rep.* 345.

A motion was made for a Prohibition, to be directed to the Sheriff's Court in *Bristol*, on suggestion that causes of action arising out of the jurisdiction of the Sheriff's Court ought not to be sued there; and this motion was made in behalf of a defendant in an action, before he had appeared, to stay the proceedings in the Court, who proceeded to attach his goods in the hands of a garnishee; and the motion was opposed; because the defendant could not pray a Prohibition on suggestion of a matter which he could not plead; and as here he could not plead this before appearance, so he ought not to make such a motion before appearance. And *per Holt*, a man shall not plead to the jurisdiction until he appear; but if the original cause of action arose out of the jurisdiction of the Court, the garnishee may plead it; and of that opinion was *Hale Ch. J.* but if it was debt on a simple contract, it is attachable where the person of the debtor is. 1 *Ld. Raym.* 346.

So, where a prohibition was moved for to the Court of the Sheriff's of *London* to stay proceeding, where they attached the debt of the garnishees, because it arose out of the jurisdiction, it was denied, because the debt was on simple contract, which follows the person of the debtor. *Ld. Raym.* 347.

V. THE general grounds for a Prohibition to the *Ecclesiastical Courts*, are either a defect of jurisdiction, or a defect in the mode of trial. If any fact be pleaded in the Court below, and the parties are at issue, the Court has no jurisdiction to try it, because it cannot proceed according to the rules of the Common Law; and in such case a Prohibition lies: Or where the Spiritual Court has no original juris-

diction, a Prohibition may be granted, even after sentence. But where it has jurisdiction, and gives a wrong judgment, this is the subject of appeal, and not of Prohibition. 2 *Term Rep.* 4.—But when a Prohibition is granted after sentence, the want of jurisdiction must appear upon the face of the proceedings of the Spiritual Court. *Ibid.* *Cowp.* 422: 4 *Term Rep.* 382.

In all cases where it appears on the face of the libel, that the Spiritual Court, &c. have not a jurisdiction, a Prohibition may be awarded, and is grantable as well after as before sentence; for the King's superior Courts have a superintendency over all inferior jurisdictions, and are to take care that they keep within their due bounds. 2 *Inst.* 602: 2 *Rol. Abr.* 319: *Noy* 137: 1 *Sid.* 65: *Cro. Eliz.* 571: *Moor* 462. 907: *Skin.* 299: *Carth.* 463: *March* 153: 2 *Rol. Rep.* 24: *Comb.* 356.

But where the Court has a natural jurisdiction of the thing, but is restrained by some statute; as by *stat.* 23 *H. 8. c. 9.* for not citing out of the diocese, there the party must come before sentence; for after pleading and admitting the jurisdiction of the Court below, it would be hard and inconvenient to grant a Prohibition. See the authorities *suprà*, and *Cro. Car.* 97: 2 *Show.* 145: *Vent.* 61: 6 *Mod.* 252: 7 *Mod.* 137: *Godb.* 163. 243: 5 *Mod.* 341: *Hell.* 19: 12 *Co.* 76: *Salk.* 543.

On a motion for Prohibition the case was, the defendant libelled in the Spiritual Court for tithes of faggots made of loppings of trees; and the suggestion for a Prohibition was, that these loppings were cut from the stumps of timber trees above the growth of twenty years: and it was alleged, that sentence was given in the Spiritual Court, therefore the plaintiff comes here too late to have a Prohibition: but *per Holt*, the sentence will not hinder the having a Prohibition in any case, but in the case of Prohibitions grounded on *stat.* 23 *H. 8. c. 9.* for citing out of the diocese; but because the plaintiff had not pleaded this matter in the Spiritual Court, they denied the Prohibition, because the spritual Court has a general jurisdiction of tithes; and if any special matter deprives them of their jurisdiction, it must be pleaded there: and if it had been pleaded there, and issue joined on it, and on the trial it had been found not to be *silva cadua*, it had been well; but if they had refused to admit the plea, a Prohibition should have been granted. 2 *Ld. Raym.* 835.

If one sues another in the Spiritual Court for a chattel or debt, the defendant shall have a Prohibition. So if he sues for a trespass. *F. N. B.* 40.

If the Spiritual Courts take on them to try the boundaries of a parish, a Prohibition lies. 2 *Rol. Abr.* 291: 7 *Co.* 44: 1 *Rol. Rep.* 332: *Cro. Eliz.* 228: 2 *Leon.* 829: 3 *Keb.* 286. *S. P.* because the prescription is the ground thereof.

If a suit be by a parson for tithes, and the defendant plead, that the place where, is in another parish, a Prohibition lies; because they meddle with that which is out of their jurisdiction, though the original thing be of their cognizance, and this comes in obliquely. 2 *Rol. Abr.* 282: 1 *Show.* 10: *Noy* 147.

So if the vicar of a parish libels against another to avoid his institution to the church of *D.* which he supposes to be a chapel of ease, appertaining to his vicarage, and the defendant suggests, that *D.* is a

parish of itself and not a chapel of ease; a Prohibition will be granted, for they shall not try the bounds of the parish. 2 *Roll. Abr.* 291.

So, if the question be in the Court-Christian, whether a church be a parochial church, or a chapel of ease, a Prohibition lies. *Ibid.*

But if the bounds of two villis lying in the same parish come in question in the Spiritual Court, no prohibition lies; for such bounds are triable in the Ecclesiastical Court, though those of parishes are not. 1 *Lev.* 78.

The Ecclesiastical Courts have cognizance of a way to a church; and for not repairing such way the parties may be proceeded against in the Spiritual Court. *March* 45.

So, if a parson is prevented from carrying away his tithe, by the stopping up the usual way, he may have his remedy in the Ecclesiastical Court, grounded on the statute 2 & 3 *Ed.* 6. c. 13: *Bulst.* 67: 1 *Jon.* 230.

But if the question be, whether he is to have one way or another, or whether such a way be a highway or not; this cannot be tried in the Spiritual Court. *March* 15: 1 *Bulst.* 67: 2 *Roll. Abr.* 287.

So if the Churchwardens of a church sue for a way to the church, which they claim to appertain to all the parishioners by prescription, a Prohibition shall be granted; for this right being grounded on the prescription, is to be tried in the Temporal Courts. 2 *Roll. Ref.* 41. 287.

If a man be admitted, instituted, and inducted, and a suit is commenced in the Ecclesiastical Court to avoid the institution, supposing it not valid; though the thing be of their cognizance, yet, because the induction, which is temporal, and gives a lay right, may depend on it, a Prohibition lies. *Hob.* 15: *Latch.* 205: 1 *Bulst.* 179: *Litt. Ref.* 165: *Poph.* 133: 1 *Roll. Abr.* 282: 1 *Show. Ref.* 10.

If there be a suit for tithes in the Ecclesiastical Court, and the tenant pleads, that the party who sues is not incumbent, but that *J. S.* is; and this plea, because it goes to the right of the incumbency, is rejected, a Prohibition lies; for by denying the tenant this liberty he might be twice charged for tithes. *Cro. Eliz.* 228: 3 *Leon.* 265.

There are frequent instances of Prohibitions being granted to the Ecclesiastical Courts, to stay suits for fees by chancellors, registrars, and proctors in those Courts; on this foundation, that demands for work and labour, are properly determinable at Common Law, and fees cannot be settled by the canon law; and that the Spiritual Court can only give costs and expences of suit, but that no action of debt will lie for such costs at Common Law; and that the profits of an office being temporal, the remedy for them ought to be by *quantum meruit*; or, in case it be an office of freehold by assise; the denial of just fees being a dissesin; therefore it seems to be now settled, that neither a proctor nor registrar can sue for fees in the Spiritual Court, but that the proper remedy is, in case of a fee certain, by an *indebitatus assumpsit*, or in case of an uncertain fee, by *quantum meruit*; and in such suits it is not necessary to prove a retainer, that being implied by law. 2 *Roll. Ref.* 59: 3 *Leon.* 268: 1 *Mod.* 176: 2 *Keb.* 615: 3 *Keb.* 303. 441. 516: 1 *Salk.* 333: 4 *Mod.* 254.

If a legatee takes a bond from the executor for payment of the legacy, and afterwards sues him in the Spiritual Court for the legacy, a Prohibition will be granted; for by taking the obligation the nature of the demand is changed, and becomes a debt or duty recoverable in

the Temporal Court. *Yelv.* 38: 2 *Vern.* 31. But 2 *Rol. Ref.* 160. *S. P. cont.* And see title *Legacy* 4.

Matters of freehold, and the rights of inheritances, are only determinable in the Temporal Courts; so that if the Ecclesiastical Courts intermeddle with those, a prohibition lies. *F. N. B.* 40: 2 *Rol. Abr.* 286: *Litt. Ref.* 164.

As in a feoffment of tithes and lands, where there is no livery, if they adjudge the tithes to pass, notwithstanding there is no livery, a Prohibition will lie. *Cro. Jac.* 270: 1 *Vent.* 41.

So, if a man devises, that his lands shall be sold for the payment of his debts, and that the overplus shall be paid to such persons in certain shares; the legatees in this case cannot sue in the Ecclesiastical Court; for the provisions intended them arise originally out of lands, and their proper remedy in this case is in a Court of Equity. *Dyer* 151. 264: *Hob.* 265: 2 *Rol. Abr.* 284, 5: 2 *Show.* 50: *Cro. Car.* 16.

But if a rent be devised out of a farm for years, the Ecclesiastical Courts may hold plea thereof; for the term for years, being only a chattel, is testamentary, consequently the rent devised thereout. 1 *Sid.* 279: 2 *Keb.* 5: 1 *Lev.* 179.

The rights to offices for life in the Ecclesiastical Courts, or Courts of Admiralty, are determinable at Common Law; as in the question concerning the validity of two patents, by which the office of Registrar to a Bishop was granted; it was held, that this should not be tried in the Spiritual Court, though the subject-matter be spiritual; because the office itself being matter of freehold, is for that reason, of temporal cognizance. 2 *Rol. Abr.* 285, 6: *Noy* 91: *Latch.* 228: *Palm.* 450: *Godb.* 390: *Cro. Car.* 65: 2 *Rol. Ref.* 306: *Raym.* 88: 1 *Lev.* 125: 4 *Mod.* 27: *Comb.* 306.

When the right of election to the office of Canon-residentiary, a freehold office, is in the Dean and Chapter, a Prohibition shall go to the Bishop, claiming a right to present by lapse, under pretence of his visitatorial authority. 1 *Term Ref.* 650.

Trespass on a glebe, being freehold, cannot be determined in the Ecclesiastical Court. *Bro. Jurisdiction*, pl. 41.

A parson libelled against the defendant in the Spiritual Court of York for having cut elms in the church-yard; and a Prohibition was granted, on suggestion that they grew on his freehold. 1 *Ld. Raym.* 212.

If a remedy be given in any case by statute, in a Temporal Court, a Prohibition lies to the Spiritual Court, if a suit be there, though the matter be of a spiritual nature; except where the jurisdiction of the Spiritual Court is saved by the same statute. 1 *Inst.* 96, b.

Preaching without licence is within the act of Uniformity, and therefore Prohibition lies to a suit in the Spiritual Court for it. *Fort.* 345.

A Prohibition lies to a suit for marrying without banns or licence, since *stat* 26 *Geo.* 2. c. 33. by which it is made felony. 2 *Wils.* 79.

But Prohibition does not lie to a suit in the Ecclesiastical Court against a Quaker for repairs of the church, on *stat.* 7 & 8 *W.* 3. c. 34; though the act gives a remedy before Justices of the Peace; for the old remedy is not taken away: nor in the case of small tithes, under *stat.* 7 & 8 *W.* 3. c. 6. *Fort.* 347.

For more learning on this subject, see 4 *New Abr.* and 17 & 18 *Vin. Abr.* and *Kyd's Com. Dig.* under title *Prohibition*.

PROHIBITIO DE VASTO, DIRECTA PARTI, A judicial writ directed to the tenant, prohibiting him from making *waste* on the land in controversy, during the suit. *Reg. Judic.* 21.

A Prohibition shall be granted to any one who commits waste, either in the house or buildings of the incumbent of a spiritual living or who cuts down trees on the glebe, or doth any other waste. *Moor* 917.

PRO INDIVISO, *For undivided.*] The possession or occupation of lands or tenements belonging to two or more persons, whereof none knows his several portion; as coparceners before partition. *Bract. lib.* 5. See title *Parceners*.

PROLES, *Lat.*] Progeny; Such issue as proceeds from a lawful marriage; though if the word be used at large, it may denote others.

PROLOCUTOR OF THE CONVOCATION-HOUSE, *Prolocutor domûs convocationis.*] An officer chosen by ecclesiastical persons, publicly assembled in convocation by virtue of the King's writ at every Parliament: there are two Prolocutors, one of the higher House of Convocation, the other of the lower House; the latter of which is chosen by the lower House, and presented to the Bishops of the higher House as their Prolocutor, that is the person by whom the lower House of Convocation intend to deliver their resolutions to the upper House, and have their own House especially ordered and governed: his office is to cause the clerk to call the names of such as are of that House, when he sees cause; to read all things propounded, gather suffrages, &c. See further title *Convocation*.

PROMISE; See *Assumpsit*.

PROMISSORY NOTES: See title *Bill of Exchange*.

PROMOTERS, *Promotores.*] Persons who in popular and penal actions prosecuted offenders, in their name and the King's, as informers, having part of the fines or penalties for their reward: they belonged chiefly to the exchequer and King's Bench; and Sir *Edward Coke* calls them *turbidum hominum genus*. 3 *Inst.* 191.

TO PROMULGE A LAW, *Promulgare Legem.*] To declare, publish, and proclaim a Law to the people; and so promulged, *promulgatus*, signifies published or proclaimed. See *stat.* 6 *H. 6. c.* 4: 1 *Comm.* 45: and this Dictionary, title *Statute*.

PRONOTARY; See *Prothonotary*.

PROOF, The shewing the truth of any matter alleged, or the trial, or making out, of any thing, by a Jury, witnesses, &c.

Bracton says, there is *Probatio duplex*, viz. *Vivâ voce*, by witnesses; and *Probatio mortua*, by deeds, writings, &c.

Proof, according to *Lilly*, is either in giving evidence to a Jury on a trial, or else on interrogatories, or by copies of records, or exemplifications of them. 2 *Lil. Abr.* 393.—Though where a man speaks generally of Proof, it shall be intended of Proof by a Jury, which in the strict signification is legal Proof. 3 *Bulst.* 56.

Condition of a bond was to pay such money as an apprentice should mispend, on Proof made by the confession of the apprentice or otherwise; and it was held, that although generally Proof shall be intended to be made on a trial by Jury, in this case it being referred to the confession of the party, it is sufficient if he confess it under his hand. *Cro. Jac.* 381.

It hath been insisted, that the Law knows no other Proof but before a Jury in a judicial way, and that which is on record; but if the Proof is modified by the agreement of the parties, that it shall be in such a manner, or before such a person, that modification which allows another manner of Proof shall be observed and prevail against the legal construction of the word Proof. *Sid.* 313: 2 *Lutw.* 436.

In articles the parties bound themselves in the penalty of 100*l.* &c. to be paid on due Proof of a breach; Proof at a trial will maintain the action. *Lutw.* 441. See further title *Evidence*.

PRO PARTIBUS LIBERANDIS, An antient writ for partition of lands between coheirs. *Reg. Orig.* 316. See title *Parceners*.

PROPER FEUDS; See title *Tenures* I.

PROPERTY, *Proprietas*.] The highest right a man can have to any thing; being used for that right which one hath to lands or tenements, goods or chattels, which no way depend on another man's curtesy.

Before men entered into society there was not any Property, but an universal right instead of it; every man might then take to his use what he pleased, and retain it, if he had sufficient power: but when men entered into society, and industry, arts and sciences were introduced, Property was gained by various means; for the securing whereof, proper laws were ordained.

It seems, that the abstract right of Property originates in *Occupancy*, or when any thing is separated for private use from the common stores of nature: and this appears agreeable to the reason and sentiments of mankind, prior to all civil establishments. See 2 *Comm. c.* 1; and *n.*; and this Dictionary, titles *Occupant*; *Liberty*; *Title*.

According to our law, Property in lands and tenements is acquired either by entry, descent by law, or conveyance; and in goods or chattels, it may be gained many ways, though usually by deed of gift, or bargain and sale. 2 *Lit. Abr.* 400.

For preserving Property the Law hath these rules:

1st, No man is to deprive another of his Property or disturb him in enjoying it.

2dly, Every person is bound to take due care of his own Property, so as the neglect thereof may not injure his neighbour.

3dly, All persons must so use their right, that they do not, in the manner of doing it, damage their neighbour's Property.

There are also three sorts of Properties, *viz.* Property absolute; Property qualified; and Property possessory; an absolute proprietor hath an absolute power to dispose of his estate as he pleases, subject to the laws of the land. The husband hath a qualified property in his wife's land, real chattels and debts; but in her chattels personal, he hath an absolute Property. *Plowd.* 5.

The right of possession of real Property, though it carries with it a strong presumption is not always conclusive evidence of the right of Property, which may still subsist in another man; for as one man may have the possession, and another the right of possession, which is recovered by possessory actions; so one man may have the right of possession, and so not be liable to eviction by any possessory action, and another may have the right of Property which cannot be otherwise asserted than by a *Writ of Right*. 3 *Comm. c.* 10. See this Dict. titles *Action*; *Writ of Right*.

Property in chattels personal may be either in *possession*; which is

where a man hath not only the right to enjoy, but hath the actual enjoyment of the thing; or else it is in *action*; where a man hath only a bare right, without any occupation or enjoyment: and of these the former, or Property in possession, is divided into two sorts, an *absolute* and a *qualified* Property. Property in possession *absolute* may be in all inanimate things, and in all such animals as are naturally tame; a qualified Property is had, under certain circumstances, in *wild animals*, being tamed; or being unable to escape *propter impotentiam*, as birds in the nest; or may be obtained *propter privilegium*, by the privilege of hunting, &c. in exclusion of others. So a qualified Property exists in the elements of light, air, and water. See 2 *Comm. c. 25*.

Every owner of goods, &c. hath a general Property in them; though a legatee of goods hath no Property in the goods given him by will until actually delivered him by the executor, who hath the lawful possession. See title *Legacy*.

And though, by a bare agreement, a bargain and sale of goods may be so far perfected, without delivery or payment of money, that the parties may have an action of the case for non-performance, yet no Property vests until delivery; therefore it is said, if a second buyer gets delivery, he has the better title. 3 *Salk. 61, 62*.

But if one covenant with me, that if I pay him so much money such a day, I shall have his goods in such a place, and I pay him the money: this is a good sale, and by it I have the Property of the goods. 27 *H. 8. 16*. See titles *Agreement; Fraud*.

As to property of Things in Possession or Action;

In Possession, it is generally, when no other can have them from the owner, or with him, without his act or default; or specially, when some other hath an interest with him, or where there is a Property also in another as well as in the owner; as by bailment, delivery of things to a carrier, or innkeeper, where goods are pawned or pledged, distrained or leased, &c. And property in Action, is when one hath an interest to sue at law for the things themselves, or for damages for them; as for debts, wrongs, &c. and all these things, in possession, or action, one may have in his own right, or in the right of another, as executor. *Wood's Inst. 314*.

A person hath such a special Property in goods delivered him to keep, that he may maintain actions against strangers who take them out of his possession; so of things delivered to a carrier, and when goods are pawned, &c. *Lil. Abr. 400, 401*.

An executor or administrator hath the property of the goods of the deceased. But a servant hath neither a general or special Property in his master's goods; therefore to take them from his master may be trespass or felony, according to the value and other circumstances. *Goldsb. 72*. See titles *Servant; Apprentice*.

If a man hires a horse, he hath a special property in the horse during the time, against all men, even against the right owner; against whom he may have an action, if he disturbs him in the possession. *Cro. Eliz. 236*. But it hath been adjudged, that if a man deliver goods, &c. to another to keep for a certain time, and then to re-deliver them; if he to whom they were delivered sell them in open market, before the day appointed for the re-delivery, the owner may seize them wherever he finds them, because the general Property was always in him, and not altered by the sale. *Godb. 160; 3 Nels. Abr. 18*. And if one delivers a horse or other cattle, or goods, to another to keep, and he

kills the horse or spoils the goods, trespass lies against him; for by the killing or spoiling, the Property is destroyed. 5 *Reph.* 13. See title *Bailment*.

If a swarm of bees light on a tree, they are not the owner's of the tree, till covered with his hive; no more than hawks that have made their nests there, &c. But their young ones will be his Property, and for them he may have trespass. *Doct. & Stud. c. 5: Co. Litt.* 145.

A man's geese, &c. fly away out of sight, wherever they go, he hath still a Property in them. *Staundf. lib. 1. c. 162. 3 Sheph. Abr.* 111.

Wild beasts, deer, hares, conies, &c. though they belong to a man on account of his game and pleasure, none can have an absolute real Property in; but if they are inclosed and made tame, there may be a qualified and possessory Property in them. See title *Game*.

One may have absolute Property in things of a base nature, as mastiff dogs, hounds, spaniels, &c. but not in things *feræ naturæ*, unless when dead. *Dalt.* 371: *Finch* 176: 11 *Reph.* 50: *Raym.* 16.

Property in lands, goods, and chattels, may be forfeited or lost, by treason, felony, flight, outlawry; also of goods by their becoming deodand, waif, estray, &c. *Back. Elem.* 77, 78. See title *Forfeiture*.

PROPERTY IN HIGHWAYS, &c. He who hath the land which lies on both sides the Highway, hath the Property of the soil of the Highway in him, notwithstanding the King hath the privilege for his people to pass through it at their pleasure; for the Law presumes that the way was at first taken out of the lands of the party who owns the lands lying on both sides the way: And divers lords of manors claim the soil as part of their waste. 2 *Lill. Abr.* 400. See title *Highway*.

If the sea or a river, by violent incursion, carries away the soil or ground in so great a quantity, that he who had the property in the soil can know where his land is, he shall have his land: but if his soil or land be insensibly wasted by the sea or river, he must lose his Property, because he cannot prove which is his land. *Pasch.* 1650. See title *Occupant*.

A tenant hath only a special property in the trees on the lands demised, so long as they remain part of the freehold; for, when they are severed, his Property is gone. 11 *Reph.* 82.

PROPERTY ALTERED. A man borrows or finds my goods, or takes them from me: neither of these acts will alter the Property. *Bro. Propert.* 27.

If one having taken away corn, make it into malt; turn plate into money, or timber into a house, &c. the Property of them is altered. *Dodderidge Law* 132, 133.

And where goods are generally sold in a market overt, for a valuable consideration, and without fraud, it alters the Property thereof. 5 *Reph.* 83. Except in some particular cases. See title *Market*.

To alter or transfer Property, is lawful; but to violate Property is never lawful, Property being a sacred thing which ought not to be violated. And every man (if he hath not forfeited it) hath a Property and a right allowed him, to defend his life, liberty, and estate; and if either be violated, the Law gives an action to redress the injury and punish the wrong. 2 *Lil. Abr.* 400. See title *Liberty*.

PROPHECIES, *Prophetiæ*.] The foretelling of things to come, in hidden mysterious speeches; whereby commotions have been often caused in the kingdom, and attempts made by those to whom such speeches promised good success, though the words were mystically

framed, and pointed only to the cognizance, arms, or some other quality of the parties. But these, for distinction sake, are called *false or fantastical Prophecies*.

False Prophecies, (where persons pretend extraordinary commissions from God) to raise jealousies in the people, to terrify them from impending judgments, &c. are punishable at Common Law, as impostures: They are reckoned by *Blackstone* among offences against the public peace; and were punished capitally by *stat. 1 E. 6. c. 12.* which was repealed in the reign of Queen *Mary*. And now by *stat. 5 Eliz. c. 15.* none shall publish or set forth any false Prophecy, with an intent to make any rebellion or disturbance, on pain of 10*l.* for the first offence, and a year's imprisonment; and for the second offence to forfeit all his goods and chattels, and suffer imprisonment during life: The prosecution to be within six months. See 3 *Inst.* 128, 129. and this Dict. title *Conjuration*.

PROPORTION, *Proportio*.] See *De Onerando pro Rata Portionis*.

PROPORTUM, *Purport*.] Intent or meaning. *Cowell*.

PROPOUNDERS. The 85th chapter of *Coke's 3d Institute* is intitled, against Monopolists, Propounders, and Projectors, where it seems to signify the same as Monopolists. *Cowell*:—rather as Projectors.

PROPRIETARY, *Proprietarius*.] He who hath a property in any thing, *quæ nullius arbitrio est obnoxia*; but was heretofore chiefly used for him who had the fruits of a benefice to himself, his heirs and successors, as abbots and priors had to them and their successors. See title *Affranchissements*.

PROPRIETATE PROBANDA, A writ to the Sheriff to inquire of the property of goods distrained, when the defendant claimeth property on a *Replevin* sued; for the Sheriff cannot proceed till that matter is decided by writ; and if it is found for the plaintiff, then the Sheriff is to make replevin; but if for the defendant, he can proceed no further. *F. N. B.* 77: *Finch* 316. 450: *Co. Lit.* 145. *b.* See title *Replevin*.

PRO RATA, *Pro proportionione*.] In proportion:—As joint-tenants, &c. are to pay *pro Rata*, i. e. in proportion to their estates. The term is also applied to an obligation, where two or more have become bound jointly to pay a sum of money. In such a case, each of the obligors is said to be liable *pro rata parte*, or proportionally: in contradistinction to these obligations by which the obligors are bound jointly and severally, by which each is liable for the whole debt. See titles *Joint tenants*; *Parceners*.

PROROGUE, To prolong or put off to another day. See title *Parliament*.

PROTECTION, *Protectio*.] Is generally taken for that benefit and safety which every Subject hath by the King's Laws; every man who is a loyal Subject is in the King's Protection; and, in this sense, to be out of the King's Protection, is to be excluded the benefit of the Law. See title *Premunire*.

In a special signification, a Protection of the King is an act of grace, by writ issued out of Chancery, which lies where a man passes over the sea in the King's service; and by this writ (when allowed in Court) he shall be quit from all personal and real suits between him

and any other person; except assises of *novel disseisin*, assise of *darrein presentment*, attaints, &c. until his return. 2 *Lil. Abr.* 398.

This term is thus further explained, *viz.* Protection is an immunity granted by the King to a certain person, to be free from suits at Law for a certain time, and for some reasonable cause; and it is a branch of the King's prerogative so to do: There are two sorts of these Protections, one is *cum clausula, Volumus*; and of that Protection there are three particulars; one is called *quia profecturus*, and is for him who is going beyond sea in the King's service; another is *quia moraturus*, which is for him who is already abroad in the King's service, as an ambassador, &c. and another is for the King's debtor, that he be not sued till the King's debt is satisfied. The other sort of Protection is *cum clausula, Nolumus, &c.* which is granted to a spiritual corporation, that their goods or chattels be not taken by the Officer of the King, for the King's service; it may likewise be granted to a spiritual person single, or to a temporal person. *Reg. Orig.* 23.

By the Common Law the King might take his debtor into his Protection, so that no one might sue or arrest him till the King's debt were paid. *F. N. B.* 28: *Co. Lit.* 131: But by *stat. 25 E. 3. st. 5. c. 19.* notwithstanding such Protection, another creditor may proceed to judgment against him with a stay of execution, till the King's debt be paid: unless such creditor will undertake for the King's debt, and then he shall have execution for both. 3 *Comm. c.* 19.

On a person's going over sea in the service of the King, writ of Protection shall issue, to be quit of suits till he return; and then a re-summons may be had against him: But one may proceed against a defendant having such Protection, until he comes and shews the Protection in Court, and hath it allowed; when his plea or suit shall go *sine die*; though if after it appears that the party who hath the Protection goes not about the business for which the protection was granted, the plaintiff may have a repeal, &c. *Terms de Ley: 2 Lil. Abr.* 398. And by *stat. 33 E. 1. st. 1.* the plaintiff may challenge the Protection, and aver, that the defendant was within the four seas; or not in the King's service, &c.

A Protection is to be made for one year, and may be renewed from year to year; but if it be made for two or three years, the Justices will not allow it: And if the King grant a Protection to his debtor, that he be not sued till his debt is paid; on these Protections none shall be delayed; the party is to answer and go to judgment, and execution shall be staid. *Co. Lit.* 130: See *ante*, and *stat. 25 Ed. 3. c. 19.*

The King granted a Protection to one of his debtors; and on demurrer it was alleged, that by *stat. 25 Ed. 3. st. 5. c. 19.* Protections of this kind are expressly, that none shall be delayed on them; and the Court ordered, that when it came to execution they would advise; so a *respondeas ouster* was awarded. *Cro. Jac.* 477.

In all Protections there ought to be a cause shewn for granting them: If obtained pending the suit, they are bad; and a person giving bail to an action on arrest, it is said, may not plead his Protection; one may not be discharged out of prison to which he is committed in execution, by Protection to serve the King, &c. Nor will a Protection be allowed where a person is taken on a *capias utlagatum*, after judgment; for though the *capias utlagatum* is at the King's suit in the first place, it is in the second degree for the Subject. *Latch.* 197. 1 *Leon.* 185: *Duer* 162: *Hob.* 115.

But in action on *assumpsit* a Protection under the Great Seal was brought into Court, for that defendant was in the wars in *Flanders*, &c. and it was allowed though after an *exigent*. 3 *Lev.* 332.

A Plaintiff in an action cannot cast a Protection; for the Protection is for the defendant, and shall be always for him, if it be not in special cases where the plaintiff becomes defendant. *New Nat. Br.* 62. And no protection shall be allowed against the King. *Co. Lit.* 131.

A Protection to save a default, is not good for any place within the kingdom of *England*: And regularly it lies only where the defendant or tenant is demandable; for the Protection is to excuse his default, which cannot be made when he is not demanded. *Jenk. Cent.* 66. 94.

These Protections are now very rarely used; the last instance of one was in 1692, when King *William III.* granted one to Lord *Cutts*, to protect him from being outlawed by his tailor. 3 *Lev.* 332.

FORM of the WRIT of PROTECTION:

GEORGE the Third, &c. *To all and singular Sheriffs, &c. and others, who shall see and hear our present letters, Greeting. Know you, that we have taken into our special Protection A. B. and all his servants, lands, and tenements, goods and chattels, in, &c. in the county of S. and in, &c. and also all his writings whatsoever: Therefore We command you, that you protect and defend the said A. B. and his servants, &c. aforesaid, not doing to him or them, or any of them, or permitting to be done to them, any injury, damage, or violence, on pain of grievous forfeiture, &c. In testimony of which, &c. for one year to endure. In Witness, &c.*

PROTECTION OF AMBASSADORS; See *Ambassadors*.

PROTECTION OF CHILDREN; See titles *Parent*; *Bastard*; *Poor*; *Homicide*.

PROTECTION OF PARLIAMENT; See titles *Parliament*; *Privilege*.

PROTECTION OF THE COURTS AT WESTMINSTER. The Protection of the Court of *B. R.* is allowed for any person who attends his own business in that Court, or by virtue of any *subpoena*. See titles *Arrest*; *Privilege*.

PROTECTIONIBUS, The statute allowing a challenge to be entered against a Protection, &c. 33 *Ed. 1. st. 1.* See title *Protection*.

PROTEST, *Protestatio*.] Hath two applications; one, by way of caution, to call witnesses, (as it were,) or openly affirm that he doth either not at all, or but conditionally, yield his consent to any act, or unto the proceeding of a Judge in a Court, wherein his jurisdiction is doubtful, or to answer on his oath further than by Law he is bound. See *Plowden* 676. and *Reg. Orig.* 306.

The other is by way of complaint, as to protest a man's bill. See title *Bills of Exchange*.

Each Peer has a right, by leave of the House, when a vote passes contrary to his sentiments, to enter his dissent on the Journals of the House, with the reasons of such dissent; which is usually styled his Protest. See title *Parliament V. 1.*

PROTESTATION, *Protestatio*.] A defence or safeguard to the party who maketh it, from being concluded by the action he is about to do, that issue cannot be joined by it. *Plowd.* 276. See title *Pleading*.

It is a form of pleading when one does not directly affirm or deny

any thing alleged by another, or which he himself allegeth. *Cowell*. As, *protestando* that he made no testament *pro placito*, that he made not the plaintiff his executor; because if he made no testament he could make no executor. *Heath's Max.* 26. cites *Pl. C.* 276.

Coke defines a Protestation to be an exclusion of a conclusion. 1 *Inst.* 124. For the use of it is, to save the party from being concluded with respect to some fact or circumstance, which cannot be directly affirmed or denied without falling into duplicity of pleading; and which yet, if he did not thus enter his Protest, he might be deemed to have tacitly waived or admitted. Thus, while tenure in villenage subsisted, if a villein had brought an action against his lord, and the lord was inclined to try the merits of the demand, and at the same time to prevent any conclusion against himself that he had waived his signiory; he could not in this case both plead affirmatively that the plaintiff was his villein, and also take issue upon the demand; for then his plea would have been double, as the former alone would have been a good bar to the action: but he might have alleged the villenage of the plaintiff, by way of protestation, and then have denied the demand. By this means the future vassalage of the plaintiff was saved to the defendant, in case the issue was found in his (the defendant's) favour: for the protestation prevented that conclusion, which would otherwise have resulted from the rest of his defence, that he had enfranchised the plaintiff; since no villein could maintain a civil action against his lord. *Co. Lit.* 126. So also, if a defendant, by way of inducement to the point of his defence, alleges (among other matters) a particular mode of seisin or tenure, which the plaintiff is unwilling to admit, and yet desires to take issue on the principal point of the defence, he must deny the seisin or tenure by way of Protestation, and then traverse the defensive matter. So lastly, if an award be set forth by the plaintiff, and he can assign a breach in one part of it, (*viz.* the non-payment of a sum of money) and yet is afraid to admit the performance of the rest of the award, or to aver in general a non-performance of any part of it, lest something should appear to have been performed; he may save to himself any advantage he might hereafter make of the general non-performance, by alleging that by Protestation; and plead only the non-payment of the money. 3 *Comm.* c. 20. *p.* 312.

Protestation is said to be of two kinds, 1st, When a man pleads any thing which he dare not directly affirm, or cannot plead, for fear of making his plea double; as if in conveying to himself by his plea a title, he ought to plead divers descents by divers persons, and he dare not affirm that they were all seised at the time of their death, or although he could do it, yet it will be double to plead two descents, of both which each one by itself may be a good bar, then the defendant ought to plead and allege the matter, introducing the word *protestando*; as to say (by Protestation) that such a one died seised, &c. and that the adverse party cannot traverse. 2dly, When one is to answer two matters, and yet by law he ought to plead but to one, then in the beginning of his plea he may say *protestando & non cognoscendo* such part of the matter to be true, (and then making his plea further) *sed pro placito in hac parte, &c.* and so he may take issue on the other part of the matter; and then he is not concluded by any of the rest of the matter which he hath by Protestation so denied. *Reg. Plac.* 70, 71. See 18 *Vin. Abr.* title *Protestation*.

In other terms, the use of a Protestation in pleading seems to be this, *viz.* When one party alleges or pleads several matters, and the other party can only offer, or take issue on one of them, he protests against the others: in such case should the issue, on trial, be found against the latter party, the record would not be evidence against him in another suit, as to those matters or points, against which he protested; which it otherwise might be, had he admitted, or not protested against them. *Dict.*

PROTESTANT CHILDREN OF PAPISTS AND JEWS. The Lord Chancellor, how to make an order on Popish and Jewish parents refusing to allow their Protestant Children a maintenance. *Stats.* 11 & 12 *Will.* 3. c. 4. § 7: 1 *Ann.* st. 1. c. 30. See title *Poor*.

PROTESTANT DISSENTERS. See titles *Dissenters*; *Nonconformists*.

POTESTANT SUCCESSION. See title *King* I.

PROTHONOTARY, *Protonotarius, vel Primus Notarius.*] A chief Officer or Clerk of the Common Pleas and King's Bench; for the first Court there are three Prothonotaries, and the other hath but one: He of the King's Bench records all civil actions; as the Clerk of the Crown Office doth all criminal causes in that Court: Those of the Common Pleas, since the order 14 *Jac.* 1. on agreement entered in between the Prothonotaries and Filazers of that Court, enter and in-roll all manner of declarations, pleadings, assises, judgments, and actions: They make out all judicial writs, except writs of *Habeas Corpus* and *Distringas Jurator*; (for which there is a particular office erected, called the *Habeas Corpora Office*;) also writs of execution, and of seisin, of privilege for removing causes from inferior Courts, writs of *procedendo*, *scire facias*'s, in all cases, and writs to inquire of damages; and all process upon prohibitions, on writs of *audita querela*, false judgment, &c. They likewise enter recognizances acknowledged in that Court; and all common recoveries; and make exemplifications of records, &c. See *stat.* 5 *H.* 4. c. 14.

PROTOCOL, the first copy. The entry of any instrument in the book of a Notary or public Officer, and which in case of the loss of the instrument may be admitted as evidence of its contents.

PROVER, *Probator*, mentioned in *stats.* 28 *Ed.* 1. st. 2: 5 *H.* 4. c. 2. See title *Approver*, and 3 *Inst.* 129. A man became an *approver*, and appealed five, and every of them joined battle with him: *Et duellum ptercussum fuit cum omnibus, & Probator devicit omnes quinque in duello; quorum quatuor suspiendebantur, & quintus clamabat esse clericum & allocatur, & Probator pardonatur.* *Mic.* 39 *E.* 3. *coram Rege*; *Rot.* 97. *Suff.*

PROVINCE, *Provincia.*] An out country, governed by a Deputy or Lieutenant. *Lit. Dict.* See this *Dict.* title *Plantation*.

It was used among the *Romans* for a country, without the limits of *Italy*, gained to their subjection by the sword; whereupon that part of *France* next the *Alps* was so called by them, and still retains the name *Provence*.

But in *England* a Province is most usually taken for the circuit of an Archbishop's jurisdiction; as the *Province of Canterbury*, and that of *York*: Yet it is mentioned in some of our statutes, for several parts of the realm; and sometimes for a county.

Ireland is divided civilly into four Provinces, *Ulster*, *Leinster*, *Connaught*, and *Munster*; and ecclesiastically into four Archbishopricks, *Armagh*, *Dublin*, *Cashel*, and *Tuam*.

PROVINCIAL, *Provincialis*.] Of or belonging to a Province; also a chief Governor of a religious order; as of friars, &c. *Stat. Antiq. 4 H. 4. c. 17.*

PROVISION, *Provisio*.] Was used for the providing a Bishop, or any other person, an Ecclesiastical Living, by the Pope, before the incumbent was dead: It was also called *gratia expectativa*, or *mandatum de providendo*: The great abuse whereof produced the statutes of *Provisors* and *Præmunire*: See the latter title.

PROVISIONES. The acts to restrain the exorbitant abuse of arbitrary power, made in the Parliament at Oxford 1258, were called *Provisiones* by *Rishanger*, who continued, *Mat. Paris, anno 1260*; being to provide against the King's absolute will and pleasure. See *Mat. Paris sub annis 1244 & 1254*. Several statutes are also called *Provisiones*, particularly *Stat. Merton, 20 H. 3.* *Provisiones* signifies also *Providentiæ*, or Provisions of victual. *Cowell.*

PROVISIONS, *Selling unwholesome*, Is reckoned by *Blackstone* among offences against public health. To prevent which the *stat. 51 Hen. 3. st. 6.* and the ordinance for bakers, *c. 7.* prohibit the sale of corrupted wine, contagious or unwholesome flesh, or flesh that is bought of a Jew; under pain of amercement for the first offence, pillory for the second, fine and imprisonment for the third, and abjuration of the town for the fourth. And by *st. 12 Car. 2. c. 25. § 11.* any brewing or adulteration of wine is punished with the forfeiture of 100*l.* if done by the wholesale merchant; and 40*l.* if done by the vintner or retail trader. *4 Comm. c. 13.* See title *Victuals*.

PROVISO, A condition inserted in any deed, on the performance whereof the validity of the deed depends; sometimes it is only a covenant, *secundum subjectam materiam. 2 Ref. 70.*

Proviso, in the most common acceptation, is that clause in a mortgage, whereby the deed is declared to be void, on payment of principal and interest. See title *Mortgage*.

The word *Proviso* is generally taken for a condition; but it differs from it in several respects; for a condition is usually created by the grantor or lessor, but a *Proviso* by the grantee or lessee; there is likewise a difference in placing the *Proviso*; as if, immediately after the *Habendum*, the next covenant is that the lessee shall repair, provided always that the lessor shall find timber, this is no condition; nor is it a condition, if it comes among other covenants after the *Habendum*, and is created by the words of the lessee; as if the lessee covenants to scour the ditches, *Proviso*, that the lessor carry away the soil, &c. *3 Nels. Abr. 21.*

It hath been held, that the Law hath not appointed any proper place in a deed to insert a *Proviso*; but that when it doth not depend on any other sentence, but stands originally by itself, and when it is created by the words of the grantor, &c. and is restrictive or compulsory, to enforce the grantee to do some act, in such case the word *Proviso* makes a condition, though it is intermixed with other covenants, and doth not immediately follow the *Habendum. 2 Ref. 70.* See title *Deed*.

A *Proviso* always implies a condition, if there be no words subsequent which may change it into a covenant: Also it is a rule in *Provisoes*, that where the *Proviso* is, that the lessee, &c. shall do, or not do a thing, and no penalty is added to it; this is a condition; or it is void; but if a penalty be annexed, it is otherwise. *Cro. Eliz. 242: 1*

Lev. 155. And where a *Proviso* is a condition, it ought to do the office of a condition, *i. e.* make the estate conditional, and shall have reference to the estate, and be annexed to it; but shall not make it void without entry, as a limitation will. See title *Condition*.

A lease was made for years, rendering rent at such a day, *Proviso*, if the rent be in arrear for one month after, the lease to be void: the question was, whether this was a condition or limitation; for if it was a condition, then the lease is not determined without entry; adjudged, that it was a limitation, though the words were conditional; because it appeared by the lease itself, that it was the express agreement of the parties that the lease shall be void on non-payment of the rent; and it shall be void without entry. *Moor.* 291. See titles *Lease*; *Ejectment*; *Rent*.

If a *Proviso* be the mutual words of both parties to the deed, it amounts to a covenant: and a *Proviso* by way of agreement to pay, is a covenant, and an action well lies upon it. *2 Rep.* 72. See title *Covenant* I.

Plaintiff conveyed an office to defendant, *Proviso* that out of the first profits he pay plaintiff 500*l.* And it was resolved, that an action of covenant lay on this *Proviso*; for it is not by way of condition or defeasance, but in nature of a covenant to pay the money. *1 Lev.* 155. But where defendant in consideration of 400*l.* granted his lands to plaintiff for ninety-nine years, *Proviso* if he pay so much yearly during the life of *S. T. &c.* or 400*l.* within two years after his death, then the grant to be void, and there was a bond for performance of covenants; in action of debt brought on this bond, it was adjudged, that there being no express covenant to pay the money, there could be no breach assigned on this *Proviso*. *2 Mod.* 36. *Sed qu.* and see *ante*.

In articles of agreement to make a lease, *Proviso* that the lessee should pay so much rent, &c. although there be no special words of reservation of rent, the *Proviso* is a good reservation. *Cro. Eliz.* 486. And *Proviso* with words of grant added to it, may make a grant and not a condition. *Moor* 174: See *1 And.* 19.

When uses are raised by covenant, in consideration of paternal love to children, &c. and after, in the same indenture, there is a *Proviso* to make leases, without any particular consideration, it is void; though such a *Proviso* might be good, if the uses were created by fine, recovery, &c. because of the transmutation of the estate: and for that, in this case, uses arise without consideration. *1 Rep.* 176: *Moor* 144: *1 Lev.* 30. See title *Use*.

In a deed, a *Proviso*, that if the son disturb the other uses, &c. that then a term granted to him, and the uses to the heirs of his body, shall be void; this *Proviso* is sufficient to cease the other uses, on disturbance. *8 Rep.* 90, 91. But a *Proviso* to make an estate, limited to one and the heirs male of his body, to cease as if he was naturally dead, on his attempting any act by which the limitation of the land, or any the estate in tail, should be undone, barred, &c. hath been adjudged not good; because the estate tail is not determined by the death of tenant in tail, but by his dying without issue male. *Dyer.* 351: *1 Rep.* 83: See title *Limitation of Lands*.

A testator devised lands to one and the heirs male of his body, *Proviso*, that if he attempt to alien, then his estate to cease and remain to another; the *Proviso* is void. *1 Vent.* 521.

A *Proviso* that would take away the whole effect of a grant, as not

to receive the profits of lands granted, &c. is void; and so is a *Proviso* which is repugnant to the express words of the grant: in a will, testator made another his executor, provided he did not administer his estate, adjudged this *Proviso* is void for repugnancy. *Cro. Eliz.* 107: *Dyer* 3.

And if a *Proviso* is good at first, and afterwards it happens that there is no other remedy but that which was restrained; the remedy shall be had notwithstanding the restraint. *Wood's Inst.* 231. Where a *Proviso* is parcel of, or abridgeth a covenant, it makes an exception; when it is annexed to an exception in a deed, it is an explanation; and where added at the end of any covenant, there it extends only to defeat that covenant. 4 *Leon.* 72, 73: *Moor* 105. 471. See *Deed; Condition; Covenant.*

PROVISO, TRIAL BY; is where the plaintiff in an action desists in prosecuting his suit, and doth not bring it to trial in convenient time, the defendant in such case may take out the *venire facias* to the sheriff, which hath in it these words, *Proviso, quod, &c. i. e. provided that*, if plaintiff take out any writ to that purpose, the sheriff shall summon but one Jury on them both, and this is called going to trial by *Proviso*. *Old Nat. Br.* 159. See title *Trial*.

Process may be taken out by a defendant in criminal cases by *Proviso* in appeals, in the same manner as in other actions, on default of the appellant: but not in indictments, nor in actions where the King is sole party; and it hath been questioned, whether there can be any such process in informations *qui tam*. 2 *Hawk. c.* 41. § 10. See *stat.* 7 & 8 *W. 3. c.* 32: 7 *Term Rep. K. B.* 661: 2 *East's Rep.* 202. 206; and this dictionary, title *Trial*.

PROVISOR, One who sued to the Court of *Rome* for a provision. See title *Premunire*. It is sometimes also taken for him who hath the care of providing things necessary; a Purveyor. *Cowell*.

PROVISOR MONASTERII, The Treasurer or Steward of a Religious House, who had the custody of goods and money, and supervised all accounts. *Cowell*.

PROVISOR VICTUALIUM, The King's Purveyor, who provided for the accommodation of his Court, is so called in our historians. *Cowell*.

PROVOCATION, To make killing a person manslaughter, &c. See title *Homicide* III. 2.

PROVOST. The principal Magistrate of a Royal Borough in Scotland. A Governing Officer of an University or College.

PROVOST MARSHAL, Is an Officer of the King's Navy, who hath the charge of prisoners taken at sea; and is sometimes used for like purpose at land. See *stat.* 13 *Car. 2. c.* 9. and title *Marshal*.

PROXIES, Persons appointed instead of others, to represent them.

Every Peer of the Realm, called to Parliament, hath the privilege of constituting a Proxy to vote for him in his absence on a lawful occasion; but such Proxies are by licence of the King, and sometimes Proxies have been denied by the King; particularly *annis* 6, 27, & 39 *Ed. 3*. See title *Parliament* V. 1.

Proxies are also annual payments made by Parochial Clergy to the Bishop, &c. on visitations. See *Procurations*.

PRYK, a kind of service or tenure: according to *Blount*, it signifies an old-fashioned spur, with one point only, which the tenant, holding land by this tenure, was to find for the King.

In the time of *Hen. VIII.* light horsemen in war were called *Prickers*; because they used such spurs or *Pryks* to make their horses go with speed.

PUBERTY, *Pubertas*.] The age of fourteen in men and twelve in women; when they are held fit for, and capable of contracting, marriage. See titles *Age*; *Infant*.

PUBLICATION, Is used of depositions of witnesses in a cause in a Chancery, in order to the hearing; it signifies the shewing the depositions openly, and giving out copies of them, &c. pursuant to the rules of the Court. See titles *Chancery*; *Depositions*.—As to the Publication of *Libels* and *Wills*, see those titles.

PUBLIC ACCOUNTS; See title *Accounts*, *Public*.

All the Lands, tenements, and hereditaments, which an accountant hath, shall, for the payment of debts to the Crown be liable and put in Execution, in like manner as if he had stood bound by writing obligatory, having the effect of a statute staple, &c. *Stat. 13 Eliz. c. 4.*

PUBLIC ACT of Parliament, See *Statute*.

PUBLIC FAITH, *Fides Publica*.] In the reign of *Charles I.* there was a pretence or cheat, to raise money of the seduced people, upon what was termed the *Public Faith* of the nation, to make war against the King, about the year 1642. *Stat. 17 C. 1. c. 18.*

PUBLIC WORSHIP; See *Nonconformists*; *Papists*; *Recusants*; *Service and Sacraments*.

PUERITIA; See *Puberty*; *Pupillarity*.

PUIS DARREIN CONTINUANCE, Is a plea of new matter, pending an action, *post ultimam continuationem*. See title *Pleading*.

PUISNE, Fr. *Puîné*.] Younger, puny, born after, junior. See *Mulier*. The several Judges and Barons, not chiefs, are called *Puisne Judges*, *Puisne Barons*.

PULSATOR, The plaintiff or actor; from *pulsare*, to accuse any one. *Leg. Hen. 1. c. 26.*

PUNISHMENT, *Pœna*.] The penalty for transgressing the Law; and as debts are discharged to private persons by payment, so obligations to the public for disturbing society, are discharged when the offender undergoes the Punishment inflicted for his offence. See title *JUDGMENT*, *Criminal*.

PUPILLARITY, The age of Infants preceding *Puberty*. See that title.

PUR AUTER VIE. Where lands, &c. are held *for another's life*. See title *Occupant*.

PURCHASE.

ACQUISITUM, PERQUISITUM, PERQUISITIO.] The buying or other acquisition of lands, or tenements, with money, or by gift, deed, or agreement; as distinct from the obtaining them by descent or hereditary right; *conjunctum perquisitum* is where two or more persons join in the Purchase. *Litt. § 2: Reg. Orig. 143.*

Purchase taken in its largest and most extensive sense, is thus defined: The possession of lands and tenements, which a man hath by his own act or agreement, and not by descent from any of his ancestors or kindred. In this sense it is contradistinguished from acquisition by right of blood; and includes every other method of coming to an estate, but merely that by inheritance: wherein the title is vested in a person not by his own act or agreement, but by the single ope-

ration of Law, *Lit.* § 12: 1 *Inst.* 18. What is termed in the Common Law *Purchase*, was by the feudists called *Conquest*, *conquæstus* or *conquisitio*: and in this sense it was that *William* the First was called *Conquæstor*, or the *Conqueror*, signifying, that he was the first of his family who acquired the Crown and Realm of *England*. See 2 *Comm.* c. 15.

This is the legal signification of the word *perquisitio*, or *Purchase*; and in this sense it includes the five following methods of acquiring a title to estates: *Escheat*, *Occupancy*, *Prescription*, *Forfeiture*, *Alienation*. See this Dictionary, under those and other titles connected therewith; and further, titles *Remainder*; *Executory Devise*; *Limitation of Estate*, &c.

Mr. *Hargrave*, after some remarks on the peculiar nature of *Escheats*, observes, that instead of distributing all the several titles to land under *Purchase* and *Descent*, it would be more accurate to say, that the title to land is either by *Purchase*, to which the act or agreement of the party is essential, or by *mere act of Law*: and under the latter to consider, first, *Descent*; and then *Escheat*, and such other titles, not being by descent, as yet like them accrue by mere act of Law. 1 *Inst.* 18. b.

One cometh in by *Purchase* when he comes to lands by legal conveyance, and hath a lawful estate; and a *Purchase* is always intended by title, either from some consideration, or by gift; (for a gift is in Law a *Purchase*;) whereas descent from an ancestor cometh of course by act of Law; also all contracts are comprehended under this word *Purchase*. *Co. Litt.* 18: *Doct. & Stud. cap.* 24.

Purchase in opposition to *Descent* is taken largely; if an estate comes to a man from his ancestors without writing, that is a *Descent*; but where a person takes any thing from an ancestor, or others, by deed, will, or gift, and not as heir at Law; that is a *Purchase*. 2 *Lil. Abr.* 403.

When an estate doth originally vest in the heir, and never was nor could be in the ancestor; such heir shall take by way of *Purchase*; but when the thing might have vested in his ancestor, though it be first in the heir, and not in him at all, the heir shall have it in nature of *Descent*. 1 *Repl.* 95. 106.

Consistent with the above rule is Mr. *Fearne's* explanation of the much contested point, in what case an heir shall be said to take by limitation, and in what by *Purchase*: or, in the language of conveyancers, what are words of limitation, and what are words of *Purchase*. See fully this Dictionary, title *Remainder*: and *post. Div.* I. of this title.

I. *In what Cases Heirs shall be deemed Purchasers; and of the Effect of their taking by Purchase.*

II. *Of Purchasers for a valuable Consideration; and how protected or made answerable in Equity.* See also this Dictionary, under titles *Fraud*; *Consideration*; *Trust*; *Mortgage*, &c.

I. *PURCHASE*, in its vulgar and confined acceptation, is applied only to such acquisitions of land as are obtained by way of bargain and sale for money, or some other valuable consideration. But this falls far short of the legal idea of *Purchase*: for if I give land freely to an-

other, he is in the eye of Law a Purchaser; and falls within *Littleton's* definition, for he comes to the estate by his own agreement, that is, he consents to the gift. 1 *Inst.* 18. A man who has his father's estate settled upon him in tail, before he was born, is also a Purchaser; for he takes quite another estate than the law of descents would have given him. Nay, even if the ancestor devises his estate to his heir at law by will, with other limitations, or in any other shape than the course of descents would direct, such heir shall take by Purchase. *Ld. Raym.* 728. Thus if a man having two daughters, his heirs, devises his land to *them and their heirs*; they shall take by Purchase as joint-tenants; for the estate of joint-tenants, and tenants in common, is different in its nature and quality from that of co-parceners. *Cro. Eliz.* 431. But if a man seised in fee, devises his whole estate to his heir at law, so that the heir takes neither a greater nor a less estate by the devise than he would have done without it, he shall be adjudged to take by descent, even though it be charged with incumbrances; this being for the benefit of creditors, and others, who have demands on the estate of the ancestor. 1 *Rol. Abr.* 626; *Salk.* 241; *Ld. Raym.* 728. If a remainder be limited to the heirs of *A.*, here *A.* himself takes nothing; but, if he dies, during the continuance of the particular estate, his heirs shall take as Purchasers. 1 *Rol. Abr.* 627; 1 *Term Rep. K. B.* 634. But if an estate be made to *A.* for life, remainder to his right heirs in fee, his heirs shall take by descent: for it is an antient rule of Law, that wherever the ancestor takes an estate for life, the heir cannot by the same conveyance take an estate in fee by Purchase, but only by descent. 1 *Rep.* 104; 2 *Lev.* 60; *Raym.* 334. And, if *A.* dies before entry, still his heir shall take by descent, and not by Purchase; for where the heir takes any thing that might have vested in the ancestor, he takes by way of descent. 1 *Rep.* 98. The ancestor, during his life, beareth in himself all his heirs; and therefore, when once he is, or might have been, seised of the lands, the inheritance so limited to his heirs vests in the ancestor himself: and the word "heirs" in this case is not esteemed a word of Purchase, but a word of limitation, enuring so as to increase the estate of the ancestor, from a tenancy for life to a fee simple. *Co. Litt.* 22. And, had it been otherwise, had the heir (who is uncertain till the death of the ancestor) been allowed to take as a Purchaser originally nominated in the deed, as must have been the case if the remainder had been expressly limited to him by name; then, in the times of strict feodal tenure, the lord would have been defrauded, by such a limitation of the fruits of his signiory, arising from a descent to the heir. 2 *Comm. c.* 15. *f.* 242. See further, this Dictionary, titles *Remainder*; *Heir* II.

The difference in effect, between the acquisition of an estate by descent and by Purchase, consists principally in these two points: *First*, That by Purchase the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, and not to the blood only of some particular ancestor. See title *Descent*. *Secondly*, That an estate taken by Purchase will not make the heir answerable for the acts of the ancestor, as an estate by descent will. For, if the ancestor by any deed, obligation, covenant, or the like, bindeth himself and his heirs, and dieth; this deed, obligation, or covenant, shall be binding upon the heir, so far forth only as he (or any other in trust for him, *stat.* 29 *Car.* 2. *c.* 3. § 10;) had any estate of inheritance, vest-

ed in him by descent from, (or any estate *per auter vie*, coming to him by special occupancy, as heir to [§ 12, of the same statute,]) that ancestor sufficient to answer the charge; whether he remains in possession, or hath aliened it before action brought. See 1 *P. Wms.* 777: *stat.* 3 & 4 *W. & M. c.* 14.: Therefore if a man covenants, for himself and his heirs, to keep my house in repair, I can then (and then only) compel his heir to perform this covenant, when he has an estate sufficient for this purpose, or assets, by descent from the covenantor: for though the covenant descends to the heir, whether he inherits any estate or no, it lies dormant, and is not compulsory, until he has assets by descent. *Finch Rep.* 86. See title *Assets*.

II. It is the rule of Equity that where a man is Purchaser for valuable consideration, without notice, he shall not be annoyed in equity; not only where he has a prior legal estate, but where he has a better title or right to call for the legal estate, than the other. *Treat. Eq. lib.* 2. c. 6. § 2. cites 2 *Vern.* 599: 2 *P. Wms.* 678, &c.

This rule is founded on an obvious principle of equity. It seems, however, to have been broken in upon by the decisions in *Burgh v. Burgh*; [*Burgh v. Francis*]; *Finch* 28: and *Williams v. Lambe*, 3 *Bro. C. R.* 264. In the former of which cases the Court appears to have interposed to the prejudice of a judgment-creditor, without notice of the plaintiff's equity; and in the latter to the prejudice of a Purchaser, without notice of the plaintiff's title as Dowress. With respect to those instances in which a *bonâ fide* Purchaser has in equity been postponed, in respect of his conniving at the subsequent fraud of him under whom he derived his title, they are evidently exceptions to the general rule, which is confined to the claim of the Purchaser at the time of completing his Purchase; a claim which he may forfeit as to third persons, by subsequent misconduct. *Fonblanque's Note on Treat. Eq. ubi sup.*: and see *Treat. Eq.* i. c. 3. § 4, *in n.*; and this Dictionary, title *Mortgage* III.

It has been said, that by taking a conveyance with notice of a trust, the Purchaser himself becomes the trustee; and must not, to serve himself, be guilty of a breach of trust, notwithstanding any consideration paid. 2 *Vern.* 271. But this proposition seems to be stated too generally; for though an immediate or first Purchaser, with notice of an equitable claim in another, shall certainly not be allowed, though a Purchaser for valuable consideration, to protect himself against such equitable claim; yet if a person, having notice of an equitable claim in another, purchase from one who had not notice of such claim, he may protect himself by want of notice in his vendor; such protection being necessary to secure to the *bonâ fide* Purchaser without notice, the full benefit of his Purchase. *Pre. Ch.* 51: 1 *Atk.* 571: 2 *Bro. C. R.* 66. Neither shall a Purchaser without notice, from a Purchaser with notice, be considered in equity as bound by the trust. 2 *Vern.* 384: *Ambl.* 313. See *post.*—It may be material to remark, that notice is not confined to the time of the contract; for if a person who has a lien in equity on the premises, give notice thereof before actual payment of the Purchase-money, it is sufficient. 3 *P. Wms.* 307: 2 *Atk.* 630: 3 *Atk.* 304: Or before the execution of the conveyance, though the Purchase-money be actually paid. 1 *Atk.* 384: *Cases in C.* 34.

Where there is a general trust, as to pay debts, though the Purchaser has notice of them, it seems that he is not obliged to see the

Purchase-money applied: otherwise if the debts be particular, as for payment of debts in a schedule. *Treat. Eq.* ii. c. 6. § 2. But though the Purchaser be bound to see to the application of the money, as to the schedule debts, he is not bound to see that only so much real estate is sold or mortgaged, as will discharge such debts; unless there be a collusion between the heir and trustee. 1 *Vern.* 301: 2 *Ch. Ca.* 115. 221.—Neither is he bound to see to the payment of Legacies, if the estate be charged generally with debts and legacies; for not being in such case bound to see to the discharge of debts, he cannot be expected to see to the discharge of the legacies, which cannot be paid till after the debts. *Fonblanque's Note on Tr. Eq. ubi sup.* cites *Jebb v. Abbot*, 1 *Bro. C. R.* See 1 *Inst.* 291. in n. and title *Trust*.

As a Purchaser for valuable consideration has an equal claim to the protection of a Court of Equity, to defend his possession, as the plaintiff has to the assistance of the Court to assert his right, a Court of Equity will not, in general, compel a Purchaser for valuable consideration, without notice of the plaintiff's title, to make any discovery which may affect his own title; but such discovery will be enforced in favour of a Dowress. See 1 *Vern.* 179: 3 *Bro. C. R.* 264.

Thus an assignee of a lease, shall not be forced to discover whether the lease is expired: but lessee for years of conusor of a statute has been compelled to discover what estate he had from the conusor to the end that he might be liable to the statute. 8 *Vin.* 554. *pl.* 2; cited *Treat. Eq. lib.* 6. c. 3. § 3.

PURGATION, *Purgatio*.] The clearing a man's self of a crime, whereof he is publicly suspected, and accused before a Judge: of which there was formerly great use in *England*.

Purgation is either *canonica* or *vulgaris*.

Canonical Purgation is, that which is prescribed by the Canon Law, the form whereof, used in the Spiritual Court, is that the person suspected take his oath, that he is clear of the fact objected against him; and bring his honest neighbours with him to make oath, that they believe he swears truly.

The Vulgar Purgation, according to the antient manner, was by fire or water ordeal, or by combat, abolished by canon. *Stawndf. P. C. lib.* 2. c. 48. See title *Ordeal*.

The canonical doctrine of Purgation, whereby the parties were obliged to answer upon oath to any matter, however criminal, that might be objected against them, (though long ago over-ruled in the Court of Chancery,) continued till the middle of the last century to be upheld by the Spiritual Courts; when the Legislature was obliged to interpose, to teach them a lesson of moderation, similar to that of the *English Law*. By *stat.* 13 *Car.* 2. c. 12. it is enacted, that it shall not be lawful for any Bishop or Ecclesiastical Judge, to tender or administer to any person whatsoever, the oath usually called the oath *ex officio*, or any other oath whereby he may be compelled to confess, accuse, or purge himself of any criminal matter, or thing, whereby he may be liable to any censure or punishment, 3 *Comm.* 100. See further, titles *Wager of Law; Chancery; Clergy, Benefit of*.

The *stat.* 13 *Car.* 2. c. 12. having thus taken away the oath *ex officio*, of persons accusing or purging themselves, &c. some maintain that all the proceedings of Purgation on common fame fall too; others say, there is still a legal Purgation left, but not canonical. *Wood's Inst.* 506, 507.

PURIFICATIO BEATÆ Mariæ Virginis. *Candlemas; February 2.* The Purification of the Blessed Virgin Mary, is one of the general returns of writs still in use, viz. the third in *Hilary* term. See *Candlemas*.

PURLIEU, or PURLUE, sometimes written *purallee*, from Fr. *pur*, *purus*, & *lieu locus*. All that ground near a forest, which, being added to the antient forests by King *Hen. II.*, *Rich. I.*, and King *John*, was afterwards disafforested and severed by the *Charta de Foresta*, and the perambulations and grants thereon, by *Hen. III.* So that it becomes *Purlue*, viz. pure and free from the laws and ordinances of the forest. *Manw. For. Laws, par. 2. c. 20.*

Our ancestors called this ground *Purlieu*, *purum locum*, because it was exempted from that servitude, which was formerly laid on it: As *Manwood* and *Crompton* call it *Pourallee*, we may derive it from *pur*, *purus*, & *allee, ambulatio*; because he who walketh or courseth within that circuit is not liable to the laws and penalties incurred by those who hunt within the forest precincts; but *Pourallee* is said to be properly the perambulation whereby the *Purlieu* is deafforested. *Stat. 33 Ed. 1. st. 5: 4 Inst. 304.*

Owners of grounds within the *Purlieu* by disafforestation, may fell timber, convert pastures into arable, &c. inclose them with any kind of inclosure; erect edifices, and dispose of them as if they had never been afforested; and a *Purlieu-man* may as lawfully hunt, to all intents, within the *Purlieu*, as any man may in his own grounds which were never afforested: he may keep his dogs within the *Purlieu* unexpedited; and the wild beasts belong to the *Purlieu-man ratione soli*, so long as they remain in his grounds, and he may kill them. *4 Inst. 303.*

If the *Purlieu-man* chase the beasts with grey-hounds, and they fly towards the forest for safety, he may pursue them to the bounds of the forest; and if he then do his endeavour to call back and take off his dogs from the pursuit, although the dogs follow the chase in the forest, and kill the King's deer there, this is no offence, so as he enter not into the forest, nor meddle with the deer so killed: and if the dogs fasten on the deer before he recover the forest, and the deer drag the dogs into the forest, in such case the *Purlieu-man* may follow his dogs and take the deer. *4 Inst. 303, 304.*

But in the case of *Sir Richard Weston*, it was said, that there was no *Purlieu* in law to hunt; that it cannot be by prescription, and there is nothing in statutes as to hunting; therefore *Purlieu-men* may only keep out the deer, but cannot kill them though they be in their ground. *1 Jones's Rep. 278. See Moor 706. 987.*

And notwithstanding *Purlieus* are absolutely deafforested, it hath been permitted, that the ranger of the forest shall, as often as the wild beasts of the forest range into the *Purlieu*, with his hounds reCHASE them back to the forest. *4 Inst.*

PURLIEU-MEN, Those who have ground within the *Purlieu*, and being able to dispend forty shillings a year freehold; who, on these two points, are licenced to hunt in their own *Purlieus*, observing what is required. *Manw. For. Laws 151. 157. 180. 186. See Purlieu.*

PURLOINING, STEALING. See title *Felony; Larceny.*

PURPARTY; See *Pourparty.*

PURPRESTURE; See *Pourpresture.*

PURSE, A certain quantity of money, amounting to 500 dollars, or 125*l.* in *Turkey*, *Merch. Dict.*

PURSUIVANT; See *Poursuivant*.

PURVEYANCE. See *Purveyance*.

PURVIEW, Fr. *pourveu*, a patent or grant.] The body, or that part of an act of Parliament which begins with, *Be it enacted, &c.* The statute 3 *Hen.* 7. stands upon a preamble and *Purview*. 2 *Inst.* 403: 12 *Repf.* 20. See title *Statute*.

PUTAGE, *Putagium*, from the Fr. *putaine*, Italian *putta*, *meretrix*.] Fornication.

By the feudal laws, if any heir female under guardianship were guilty of this crime she forfeited her part to her coheirs; or if she were an only heiress, the lord of the fee took it by escheat. *Spelman; Cowell*.

PUTATIVUS, Putative, reputed, or commonly esteemed; in opposition to notorious and unquestionable.—*Pater pueri putativus*, the reputed father of the child. *Jo. Brompton* 909.

When a single woman, with child, swears that such a man is the father, he is called the Putative father. See title *Bastard*.

PUTTING IN FEAR; See title *Robbery*.

PUTURA, *q. Potura*.] A custom claimed by keepers in forests, and sometimes by bailiffs of hundreds, to take man's meat, horse meat, and dog's meat, of the tenants and inhabitants within the perambulation of the forest, hundred, &c.; and in the liberty of *Knaresburgh* it was long since turned into the payment of 4*d.* in money by each tenant. *M. S. de Temp.* Ed. 3.: 4 *Inst.* 307. The land subject to this custom is called *Terra Putura*, *Plac. apud Cestr.* 31 Ed. 3.

PYKER, or PYCAR, A small ship or herring boat. See *stat.* 31 Ed. 3. c. 2.

Q.

QUA

QUADRAGESIMA, The fortieth part; also the time of *Lent*, from our Saviour's *Forty Days' Fast*. *Lit. Dict.* *Quadragesima Sunday*, Is the first *Sunday* in *Lent*; so called, because about the fortieth day before *Easter*. *Blount*.

QUADRAGESIMALIA. In former days it was the custom for people to visit their mother church on *Midlent-Sunday*, and to make their offerings at the High Altar; as the like devotion was again observed in *Whitsun-Week*: But as the procession and oblations at *Whitsuntide* were sometimes commuted into a rated payment of *Pentecostals*; so the *Lent* or *Easter* offerings were changed into a customary rate called *Quadragesimalia*, and *Denarii Quadragesimales*, also *Lætare Jerusalem*, from those words in the Hymn for the Day. *Dict.*

QUADRANS, a fourth part of a penny: Before the reign of *Ed. I.* the smallest coin was a sterling or penny, marked with a cross, by the guidance whereof a penny might be cut into halves for a half-penny, or into quarters or four parts for farthings; till, to avoid the fraud of unequal cutting, that King coined half-pence and farthings in round distinct pieces. *Mat. Westm. anno 1279.*

QUADRANTATA TERRÆ, *Quadrarium*; The fourth part of an acre. See *Fardingdeal*.

QUADRIENNIUM UTILE. In Scotch Law, the term of four years allowed to a minor after his majority, in which he may by suit or action endeavour to annul any deed to his prejudice granted during his minority. *Bell's Scotch Dict.*

QUADRIVIUM, The centre of four ways, where four roads meet and cross each other. By statute, posts with inscriptions are to be set up at such cross ways, as a direction to travellers, &c. See title *Highways*.

QUÆ EST EADEM, *Which is the same, trespass, &c.*] Words used in pleading to supply the want of a traverse; 2 *Lil. Abr.* 405. As where a plaintiff brings an action of *Trespas*, and the defendant pleads, that the plaintiff gave him leave to enter on the land, and that he entered accordingly; *Quæ est eadem Transgressio*, "which is the same trespass, of which the plaintiff complains." See titles *Pleading*; *Trespas*.

QUÆ PLURA, A writ which lay where an inquisition had been taken by an *Escheator* of lands, &c. of which a man died seised, and all the land was supposed not to be found by the office or inquisition; this writ was therefore to inquire of *what more* lands or tenements the party died seised, *Reg. Orig.* 293: But it is now useless, since the taking away the Courts of Wards and Offices *post mortem*, by *stat. 12 Car. 2. c. 24.*

QUÆRE, or *Querie*; A note for the reader to make further inquiry, where any point of Law, or matter of debate, is doubted, as not having sufficient authority to maintain it. 2 *Lil. Abr.* 406.

QUÆRENS NON INVENIT PLEGIUM; A return made by the Sheriff, on a writ directed to him with this clause, *viz. Si A. fecerit B. securum de clamore suo prosequendo, &c. F. N. B. 38.* See title *Original*.

QUÆ SERVITIA, See *Per quæ Servitia*.

QUÆSTA, An indulgence or remission of penance, exposed to sale by the *Pope*: The retailers thereof were called *Questionarii*, and desired charity for themselves or others. *Mat. West. anno 1240.*

QUÆSTUS, That which a man hath by purchase; as *hæreditas* is what he hath by descent. *Glanv. lib. 7. c. 1.* See *Purchase; Quæstus.*

QUAKERS, *Tremuli.*] From their pretending to tremble or *quake* in the exercise of their religion. The *stat. 7 & 8 W. 3. c. 27.* enacts, That Quakers making and subscribing the declaration of fidelity mentioned in *1 W. & M.* (now according to the *stat. 8 Geo. 1. c. 6.*) should not be liable to the penalties against others refusing to take the oaths; and not subscribing the declaration of fidelity, &c. they are disabled to vote at election of Members of Parliament.

Quakers, where an oath is required, are permitted to make a solemn affirmation or declaration, declaring in the presence of God, the witness of the truth, &c. *stat. 7 & 8 W. 3. c. 34.* made perpetual by *stat. 1 Geo. 1. c. 6.* But they are not capable of being witnesses in a criminal cause, serving on Juries, or bearing any office in the Government unless they are sworn like other Protestants.

On the affirmation of a Quaker, the Court will not grant an attachment for non-performance of an award. *1 Strange 441.* Nor security for the peace. *Ibid. 527.* Nor a rule for an information. *2 Strange 856. 872. 946.* But a rule to shew cause why an appointment of overseers should not be quashed, being served by a Quaker, was made absolute on his affirmation; this not being looked on as a criminal prosecution, though on the Crown side, and the rule in the King's name. *2 Strange 1219.*

The *stat. 8 Geo. 1. c. 6.* authorises the affirmation of Quakers with the words, *I do solemnly, sincerely, and truly declare and affirm, &c.* without saying in the presence of Almighty God; and by this statute, false and corrupt affirming incurs the penalties of wilful perjury.

By *stat. 22 Geo. 2. c. 46. § 36.* an affirmation shall be allowed in all cases (except criminal) where by an act of Parliament an oath is required though no provision be therein for admitting a Quaker to make his affirmation. Quakers refusing to pay tithes, or church rates, Justices of Peace are to determine them, and order costs, &c. *Stats. 7 & 8 W. 3. c. 34. § 4: 1 Geo. 1. c. 6.* Quakers may be committed to prison for non-payment of tithes, on *stat. 27 H. 8. c. 20.* which is not repealed by *7 & 8 W. 3.* which gives another remedy. *1 Ld. Raym. 323.* See title *Tithes*.

A Quaker, who has served an apprenticeship of seven years, is entitled to be admitted to the freedom of a Corporation, as well as any other person: And his solemn affirmation is equivalent to taking the usual oaths: The clause of the *stat. 7 & 8 W. 3. c. 34.* which provides, that no Quaker, by virtue of that act shall have any office or place of profit in the Government, does not extend to the freedom of a Corporation. *Carth. 448: 1 Ld. Raym. 337: 3 Mod. 402.*

In the *Militia Acts*, and the several acts for raising men for defence of the Realm, provisions are introduced for relieving Quakers

against the operation of them by the payment of certain fines; the Tenets of the Quakers preventing them from serving in war.

QUALE JUS. A judicial writ, which was brought where a man of religion had judgment to recover land, before execution was made of the judgment; it went forth to the escheator between judgment and execution, to inquire *what right* the religious person had to recover, or whether the judgment were obtained by collusion between the parties, to the intent that the lord might not be defrauded. *Reg. Judic.* 8. 16. 46. *Stats. Westm.* 2: 13 G. 1. *st.* 1. c. 32.

QUALIFIED, Is applied to a person enabled to hold two benefices. See *Plurality*.

QUALIFIED (or Base) FEE; Is such a one as hath a qualification subjoined thereto. See title *Estate*.

QUALIFIED OATH, An Oath where the party swears not simply, but circumstantially.

QUALIFIED PROPERTY; See *Possession; Property*.

QUAMDIU SE BENE GESSERIT, *As long as he shall behave himself well* in his office. A clause often inserted in letters patent of the grant of offices, as in those to the Barons of the Exchequer, &c. which must be intended in matters concerning their office; and is nothing but what the Law would have implied, if the office had been granted for life. 4 *Inst.* 117. See title *Judges*.

QUANTUM MERUIT, *So much as he deserved.*] An action on the case; express or implied, grounded on a promise to pay the plaintiff for doing any thing so much as he should deserve or merit.

If a man retains any person to do work or other thing for him; as a taylor to make a garment, a carrier to carry goods, &c. without any certain agreement; in such case, the Law implies that he shall pay for the same, as much as they are worth, and shall be reasonably demanded; for which *Quantum Meruit* may be brought: And if one sue another on a promise to satisfy him for work done, &c. he must shew and aver in his declaration how much he deserved for his work. See title *Pleading* I. 1.

QUANTUM VALEBAT, *So much as it was worth.*] Where goods and wares sold are delivered by a tradesman at no certain price, or to be paid for them as much as they are worth in general: then *Quantum valebat* lies, and the plaintiff is to aver them to be worth so much: so where the Law obliges one to furnish another with goods or provisions; as an innkeeper his guests, &c. See titles *Assumpsit; Pleading* I. 1.

QUARANTINE. See *Quarentine*.

QUARE CLAUSUM FREGIT. See titles *Capias; Common Pleas*.

QUARE CUM, Are general words used in original writs, &c. See *Original*.

QUARE EJECIT INFRA TERMINUM; A Writ which lieth by the ancient Law where the wrong-doer or ejector is not himself in possession of the lands, but another who claims under him. As where a man leaseth lands to another for years, and after, the lessor or reversioner entereth, and maketh a feoffment in fee or for life of the same lands to a stranger: Now the lessee cannot bring a writ of *Ejectione firma*, or ejectment against the feoffee; because he did not eject him, but the reversioner: neither can he have any such action to recover his term against the reversioner who did oust him, because he is not now in possession. And upon that account this writ was devised upon the

equity of *stat. Westm.* 2. c. 24. as in a case where no adequate remedy was already provided. *F. N. B.* 198. And the action is brought against the feoffee, for deforcing or keeping out the original lessee, during the continuance of his term; and herein, as in the ejectment, the plaintiff shall recover so much of the term as remains; and also shall have actual damages for that portion of it, whereof he has been unjustly deprived. 3 *Comm.* c. 11. p. 207.

Since the introduction of fictitious ousters, whereby the title may be tried against any tenant in possession, (by what means soever he acquired it,) and the subsequent recovery of damages, by action of trespass for mesne profits, this writ is fallen into disuse. See title *Ejectment*.

It is in the election of lessee, or, if he grants over his term, the second lessee, to sue a writ of *Ejectione firmæ*, or a *Quare ejecit infra Terminum* against the lessor, or his heir, or against the lord by escheat, &c. if they put the termor out of his term. 19 *Hen.* 6.

QUARE IMPEDIT.

A Writ lying for him who hath purchased an *advowson*, against a person who *hinders* or disturbs him in his right of advowson by presenting a Clerk thereto, when the church is void. *F. N. B.* 32: *Stat. Westm.* 2. c. 5.

It differs from assise of *darrein presentment* (*ultima presentationis*), because that lies where a man or his ancestors, under whom he claims, have formerly presented to the church; and this for him who is purchaser himself; but in both the plaintiff recovers the presentation and damages; though in the writ of *darrein presentment*, &c. he recovers only the presentation, not the title, to the advowson, as he doth in a *Quare impedit*; for which reason the remedy by that assise is discontinued: And where a man may have assise of *darrein presentment*, he may have *Quare impedit*. 2 *Inst.* 356. See title *Darrein Presentment*.

Upon the vacancy of a living, the Patron is bound to present within six calendar months, otherwise it will lapse to the Bishop. See title *Advowson* II. But if the presentation be made within that time, the Bishop is bound to admit and institute the Clerk, if found sufficient; unless the church be full, or there be notice of any litigation. For if any opposition be intended, it is usual for each party to enter a *caveat* with the Bishop, to prevent his institution of his antagonist's Clerk. An institution after a *caveat* entered is void by the Ecclesiastical Law; but this the Temporal Courts pay no regard to, and look upon a *caveat* as a mere nullity. But if two presentations be offered to the Bishop upon the same avoidance, the church is then said to become litigious; and, if nothing farther be done, the Bishop may suspend the admission of either, and suffer a lapse to incur. Yet if the Patron or Clerk on either side request him to award a *jus patronatûs*, he is bound to do it. This *jus patronatûs* is a commission from the Bishop, directed usually to his Chancellor, and others of competent learning; who are to summon a Jury of six Clergymen and six Laymen, to inquire into and examine who is the rightful Patron; (see title *Jus patronatûs*;) and if, upon such inquiry made and certificate thereof returned by the Commissioners, he admits and institutes the Clerk of that Patron whom they return as the true one, the Bishop secures himself at all events from being a disturber, whatever pro-

ceedings may be had afterwards in the Temporal Courts. 3 *Comm.* c. 16.

The Clerk refused by the Bishop may also have a remedy against him in the Spiritual Court, denominated a *duplex querela*: which is a complaint in the nature of an appeal, from the Ordinary to his next immediate superior; as from a Bishop to the Archbishop, or from an Archbishop to the Delegates; and if the Superior Court adjudges the cause of refusal to be insufficient, it will grant institution to the appellant.

Thus far matters may go on in the mere ecclesiastical course; but in contested presentations they seldom go so far; for upon the first delay or refusal of the Bishop, to admit his Clerk, the Patron usually brings his writ of *Quare impedit* against the Bishop; for the temporal injury done to his property, in disturbing him in his presentation. And, if the delay arises from the Bishop alone, as upon pretence of incapacity, or the like, then he only is named in the writ; but if there be another presentation set up, then the pretended Patron and his Clerk are also joined in the action; or it may be brought against the Patron and Clerk, leaving out the Bishop; or against the Patron only. But it is most advisable to bring it against all three: for if the Bishop be left out, and the suit be not determined till the six months are past, the Bishop is entitled to present by lapse; for he is not party to the suit; but, if he be named, no lapse can possibly accrue till the right is determined. *Cro. Jac.* 93. If the Patron be left out, and the writ be brought only against the Bishop and the Clerk, the suit is of no effect, and the writ shall abate; for the right of the Patron is the principal question in the cause. *Hob.* 316: 7 *Repl.* 25. If the Clerk be left out, and has received institution before the action brought (as is sometimes the case), the Patron by this suit may recover his right of Patronage, but not the present turn; for he cannot have judgment to remove the Clerk, unless he be made a defendant, and party to the suit, to hear what he can allege against it. For which reason it is the safer, and now usual, way to insert all three in the writ. See *Hob.* 320: *Jenk. Cent.* 200.

Quare impedit will not lie against the Ordinary and Incumbent, without naming the Patron; because at Common Law the Incumbent could not plead any thing which concerned the right of patronage, therefore it is unreasonable that he alone should be named in the writ who could not defend the patronage; but *stat. 25 Ed. 3. st. 3. c. 7.* enables him to plead against the King, and to defend his incumbency, although he claims nothing in the patronage; and by that statute he shall plead against any common person; though with this difference that when the inheritance of the Patron is to be divested by judgment in a *Quare impedit*, there he must be named in the writ; but where the next presentation only is to be recovered, he need not be named: yet where the King presents without a title, and his Clerk is inducted, the *Quare impedit* is to be against the Ordinary and Incumbent; for it will not lie against the King; but, if he is plaintiff, the writ may be brought against the Patron alone, without naming the Incumbent. 7 *Repl.* 25: *Cro. Jac.* 650: *Palm.* 306.

By the writ of *Quare impedit* a Patron may be relieved, not only on his presentation to a church, but to a chapel, prebend, vicarage, &c. And this writ lies of a donative; and the special matter is to be set forth in the declaration: It also lieth for a deanery by the King, al-

though it be elective; and for an archdeaconry; but not for a mere office of the church. *Co. Litt.* 344: 1 *Leon.* 205. And the chapter may have a *Quare impedit* against the Dean, of their several possessions. 40 *Ed.* 3. 48.

If the *Quare impedit* be for a donative, the writ shall be *Quare impedit* to present to the donative; if of a parsonage, then *Quare impedit præsentare ad Ecclesiam*; if to a vicarage, *ad Vicariam*; if to a Prebend, *ad Prebendam*, &c. 3 *Nels. Abr.* 35.

If the right of nomination be in one, and the right of presentation in another, and either impede the other in his right, *Quare impedit* lies. 3 *Term Rep.* K. B. 646.

If a Bishop be disturbed to collate, where he ought to make collation, he may have a writ *Quare impedit*, and the writ shall be *quod permittat ipsum præsentare*, &c. and he shall count on the collation; and if the King be disturbed in his collation by letters patent, he shall have *Quare impedit*, &c. *New Nat. Br.* 73.

Grantee of a next avoidance may bring this writ against the patron who granted the avoidance. 39 *Hen.* 6.

It may be brought by Executors, for a disturbance in *vitâ testatoris*; and executors, being disturbed in their presentation, may bring *Quare impedit* as well as their testator might. *Owen* 99: *Lutw.* 1.

Husband and wife jointly, or the husband alone without his wife, may have the writ *Quare impedit*; and if a man who hath an advowson in right of his wife be disturbed in his presentation, and dies, the wife shall bring it on that disturbance. 14 *Hen.* 4: 5 *Rep.* 97.

The heir shall not have *Quare impedit*, for a disturbance *tempore patris*; nor can he have execution on a recovery by the ancestor. *Br. Q. Imp. pl.* 7. 9. But by *stat.* 13 *Ed.* 1. c. 5. usurpation of churches during wardship, particular estates of vacancy, &c. shall not bar an heir at full age, reversioner in possession, or a spiritual person in succession, from having a writ possessory of *Quare impedit*, &c. as the ancestor or predecessor might have had, if such usurpation had been in their time: and the same form of pleading shall be had in *darrein presentment*, and *Quare impedit*.

Where partition is made on record, to present by turns, the coparcener who is disturbed shall not be put to a *Quare impedit*; but may have remedy on the roll, by *scire facias*: it is otherwise on an agreement to present. See *st.* 13 *E.* 1. c. 5. § 5. and title *Parceners*.

If tenant in tail suffer an usurpation, and die, and six months pass, the issue in tail cannot bring *Quare impedit*; but at the next avoidance he may have it within the six months. 46 *Assise* 4.

As this writ is all in the possession; the presentment of a grantee of the next avoidance is a good title for the grantor and patron in fee to bring it; and likewise for his heir, and other grantees. 9 *Hen.* 7. 23: 5 *Rep.* 97.

The King cannot remove an incumbent, presented, instituted, and inducted, although on an usurpation, but by *Quare impedit* in a judicial way. *Cro. Jac.* 385. See title *Advowson* III.

He who claims by a recovery, shall maintain a *Quare impedit*. *Stat.* 7 *H.* 8. c. 4.

The writ of *Quare impedit* must be brought in the county where the church is: It commands the disturbers, the Bishop, the Pseudopatron, and his Clerk, to permit the plaintiff to present a proper person (without specifying the particular Clerk) to such a vacant church,

which pertains to his patronage; and which the defendants, as he alleges, do obstruct; and unless they so do, then that they appear in Court to shew the reason why they hinder him. *F. N. B.* 32.

There is no limitation with regard to time within which *Quare impedit* (or any other action touching advowsons) is to be brought; at least none later than the times of *Rich. I.* and *Hen. III.* See title *Limitation of Actions*.

Immediately on the suing out of the *Quare impedit*, if the plaintiff suspects that the Bishop will admit the defendant's or any other Clerk, pending the suit, he may have a prohibitory writ, called a *Ne admittas*; which recites the contention begun in the King's Courts, and forbids the Bishop to admit any Clerk whatsoever, till such contention be determined. See title *Ne admittas*.

In the proceedings upon a *Quare impedit*, the plaintiff must set out his title at length, and prove at least one presentation in himself, his ancestors, or those under whom he claims; (except in case of a church created by himself; see *post.*; for he must recover by the strength of his own right, and not by the weakness of the defendant's. *Vaugh.* 7, 8. and he must also shew a disturbance before the action brought. *Hob.* 199. Upon this the Bishop and the Clerk usually disclaim all title, save only, the one as Ordinary, to admit and institute; and the other as presentee of the Patron, who is left to defend his own right. And, upon failure of the plaintiff in making out his own title, the defendant is put upon the proof of his, in order to obtain judgment for himself, if needful. But if the right be found for the plaintiff, on the trial, three farther points are also to be inquired: *First*, If the church be full; and, if full, then of whose presentation: for if it be of the defendant's presentation, then the clerk is removable by writ brought in due time. *Secondly*, Of what value the living is: and this in order to assess the damages which are directed to be given by the statute of *Westminster* 2. 13 *E. 1. c. 5*: see *post.* *Thirdly*, In case of plenarty upon an usurpation, whether six calendar months have passed between the avoidance and the time of bringing the action: for then it would not be within the statute, which permits an usurpation to be divested by a *Quare impedit*, brought *infra tempus semestris*. So that plenarty is still a sufficient bar in an action of *Quare impedit*, brought above six months after the vacancy happens; as it was universally by the Common Law, however early the action was commenced. 2 *Inst.* 361: 3 *Comm. c. 16*. See title *Advowson* III.

In the declaration of the plaintiff, it is not sufficient for him to allege, that he, or such a person from whom he claims, were seised of the advowson of the church, but he must allege a presentation made by one of them; for, if he doth not, the defendant may demur to the declaration: and the reason is, that the plaintiff, by joining the last presentation to his own title, is to make it appear, that he hath a right to present now as well as then. *Cro. Eliz.* 518: 5 *Rep.* 97: *Vaugh.* 57. But the want of such allegation may be cured by verdict. 2 *Stra.* 1006. See 3 *Bos. & Pul.* 444.

And if a man, by the King's licence, creates a church which shall be presentable, if he be disturbed to present to it, he may have a *Quare impedit* without alleging a presentation in any person: but antiently it was held he might not, because he could not allege a presentation. 20 *Ed. 4.* 14: *Mallory's Q. Imped.* 153.

The only plea the Bishop hath by the Common Law on a *Quare*

impedit is, that he claimeth nothing but as Ordinary; he could not counterplead the Patron's title, or any thing to the right of patronage, nor could the Incumbent counterplead such title, till the *stat. 25 Ed. 3. st. 3. c. 7.* by which both Bishop and Incumbent may counterplead the title of the Patron; the one, when he collates by lapse, or makes title himself to the patronage; the other, being *persona impersonata*, may plead his Patron's title, and counterplead the title of the plaintiff. And it has been adjudged, that an Incumbent cannot plead to the title of the parsonage, without shewing that he is *persona impersonata* on the presentation of the Patron. *W. Jones 4: March. 159.*

Several were plaintiffs in a *Quare impedit*, the defendant pleaded the release of one of them pending the writ; and it was resolved, that this release shall only bar him who made it, and that the writ shall stand good for the rest. *5 Rep. 97.*

In all *Quare impedit*s, a defendant may traverse the presentation alleged by the plaintiff, if the matter of fact will bear it; but the defendant must not deny the presentation alleged, where there was a presentation. *Vaugh. 16, 17.* And if a presentation is alleged in the grantor and grantee, the presentation in the grantor is only traversable; for that is the principal. *Cro. Eliz. 518.*

Quare impedit was brought against two, one of them cast an essoin, and *idem dies datus est* to the other, &c. Then an attachment issued against them for not appearing at the day, and process continued to the *Grand Cape*; which being returned, and the parties not appearing, it was ruled that final judgment should be entered according to the *stat. 52 H. 3. c. 12.* But on motion to discharge this rule, because the defendants were not summoned either on the attachment or grand distress, the summoners being only the feigned names of *John Doe* and *Richard Roe*, the judgment was set aside; for the design of the statute was to have process duly executed, and that must be with notice, &c. And where the right is for ever concluded, this being so fatal, the process must never be suffered to be a thing of course. *1 Mod. 248.*

Where two defendants in a *Quare impedit* plead several bars, and one of them is found against the plaintiff, and the other with him; he shall not have his writ to the Bishop. And if there are many defendants pleading several pleas, the plaintiff shall not have judgment before all the pleas are tried: for though some be for the plaintiff, others may be found against him, and he cannot have judgment without a good title. *F. N. B. 30: Hob. 70.*

If it be found that the plaintiff hath the right, and hath commenced his action in due time, then he shall have judgment to recover the presentation; and, if the church be full by institution of any clerk, to remove him: unless it were filled, *pendente lite*, by lapse to the Ordinary, he not being party to the suit; in which case the plaintiff loses his presentation *pro hac vice*, but shall recover two years' full value of the church from the defendant, the pretended Patron, as a satisfaction for the turn lost by his disturbance; or in case of insolvency, the defendant shall be imprisoned for two years: and in other cases half a year's value, and half a year's imprisonment. *Stat. Westm. 2: 13 Ed. 1. c. 5. § 3.* But if the church remains still void at the end of the suit, then whichever party the presentation is found to belong to, whether plaintiff or defendant, shall have a writ directed to the Bishop *ad admittendum clericum*, reciting the judgment of the Court, and order-

ing him to admit and institute the Clerk of the prevailing party; and, if upon this order he does not admit him, the Patron may sue the Bishop in a writ of *Quare non admisit*, and recover ample satisfaction in damages. *F. N. B.* 38. 47: 1 *Mod.* 254: 3 *Comm. c.* 16. See title *Quare non admisit*.

In a *Quare impedit*, though it was found that the church was full of another, who was a stranger to the writ, and it did not appear whether he came in by a better title than that which was found for the plaintiff; it was held, that the plaintiff might have a general writ to the Bishop, which he is bound by law to execute, or shall be amerced, &c. and he cannot return that the church is full of another; for no issue can be joined between the Bishop and the plaintiff, because he has no day in Court. 6 *Rep.* 51: 3 *Leon.* 136: See *ante* and *post*.

But where the plaintiff recovered an advowson in ejectment, and thereupon had a writ to the Bishop, there being another Incumbent in the church, who was not a party to the action; adjudged, that this writ would not lie without a *scire facias* to the Incumbent. *Sid.* 93.

If it appears in *Quare impedit*, either in pleading or by confession of the parties, that neither of them have a title, but that it is in the King; the Court may award a writ to the Bishop for the King, to remove the Incumbent, and admit *idoneam personam ad præsentationem regis*; but this must be when his title is very plain. *Hob.* 126. 163: 1 *Leon.* 323.

In *Quare impedit*, the plaintiff and defendant are both actors; so that the defendant may have a writ to the Bishop, as well as the plaintiff; but not without a title appearing to the Court; wherefore, if the defendant never appears, the plaintiff must make out a title for form sake, and so must the defendant, if the plaintiff be nonsuited. *Hob.* 163.

If the plaintiff, after appearance, in a *Quare impedit* be nonsuited, it is peremptory; because the defendant on title made, whereby he becomes actor, shall have a writ to the Bishop: and it is the same in case of a Discontinuance. 7 *Rep.* 27.

It is the nature of a *Quare impedit* to be final, either on a discontinuance or nonsuit; and a man cannot have two suits for the same thing in this case against one person, though he may have several *Quare impedit*s against several persons. 7 *Rep.* 27: *Hob.* 137.

The Parson, Patron, and Ordinary are sued; the Ordinary disclaims, and the Parson loseth by default; the plaintiff shall have judgment to recover his presentation, and a writ shall issue to the Bishop, &c. with a *cesset executio*, until the plea is determined between the plaintiff and Patron. *Vaughan* 6.

In a *Quare impedit* against the Archbishop, the Bishop, and three defendants: the Archbishop pleaded that he claimed nothing but as Metropolitan; and the Bishop pleaded that he claimed nothing but as Ordinary; and the defendants made title; but there was a verdict against them: It was a question, whether the writ of execution should be awarded to the Archbishop, or the Bishop; and it was held, that where neither of them are parties in interest, it may be directed to either; but if the Bishop is party in interest, it must be directed to the Archbishop. 6 *Rep.* 48: 3 *Bulst.* 174. And if the Archbishop of *Canterbury* be plaintiff in a *Quare impedit*, the writ must be directed to the Archbishop of *York*. *Show.* 329.

If a defendant pleads *Ne disturba*, (that he did not disturb,) which

is, in effect, the general issue in a *Quare impedit*, this will be only a defence of the wrong with which he stands charged, and is so far from controverting the plaintiff's title, that the plea, as it were, confesses it; and the plaintiff may presently pray a writ to the Bishop, or maintain the disturbance in order to recover damages. *Hob.* 163.

There must be a disturbance to maintain this action: In a *Quare impedit*, the Patron declared on a disturbance of him to present 1 *November*; the Incumbent pleaded, that 1 *May* next after, the presentation devolved on the Queen by lapse, and she presented him to the church, &c. And on demurrer the plea was held ill; because the defendant had not confessed and avoided, nor traversed the disturbance set forth in the declaration: and though by the demurrer the Queen's title was confessed, it appearing that it was already executed, and the defendant having lost his incumbency by ill pleading, the writ shall not be awarded to the Bishop for the Queen to present again, but for the Patron. 1 *Leon.* 194.

The Courts at *Westminster* are very cautious not to abate the writ of *Quare impedit*, for any want of form, &c. yet if the Bishop against whom the writ is brought, or any of the defendants are misnamed, it is good cause of abatement: if the Patron be not named in the writ, it may be pleaded in abatement: though death of the Patron, pending the writ, doth not abate it, if the *Quare impedit* is brought against the Bishop, Patron, and Incumbent: and if the Incumbent dies, pending the writ, and a disturber present again, and die, *Quare impedit* would lie on the first disturbance by Journies Accounts; but the first writ is abated by the plaintiff's death; also if the plaintiff bring a new writ within fifteen days after the abatement, that shall be a continuance of the first writ, and prevent the defendant taking any advantage: but if the writ abate for any fault in the declaration, the defendant shall have a writ to the Bishop to admit his Clerk; so, if judgment is given on demurrer, &c. *Cro. Eliz.* 324: *Cro. Car.* 651: 7 *Repl.* 57: *Dyer* 240.

In a plea of *Quare impedit*, days are given from 15 to 16, or from three weeks to three weeks, according to the distance of place: and if the disturber come not in on the great distress, a writ is to be sent to the Bishop, that he claim not to the prejudice of the plaintiff, for that time; and, on recovery, judgment is be given to the party to recover the presentation and advowson. *Stat.* 52 *Hen.* 3. c. 12: 2 *Roll. Abr.* 377.

Though damages are given by *stat. Westm.* 2. c. 5. they shall not be had against the Bishop, where he claims nothing but as Ordinary, and is no disturber. 3 *Lev.* 59. Before this statute no damages were allowed on a *Quare impedit*; and the King hath none at this day; for although he declares *ad damnum*, &c. he is not within that statute; because by his prerogative he cannot lose his presentation. 6 *Repl.* 52. If the plaintiff hath a verdict, and the church is found vacant, the patron may have the fruits of his presentation, and so not be entitled to damages; in which case, a *remittitur de damnis* is entered. 3 *Lev.* 59.

The points to be inquired of, where the Jury find for the plaintiff, &c. are, of yhom, and on whose presentation, the church is full; how long since it was void; the yearly value of the church, &c. which being found, damages are to be given accordingly. 6 *Repl.* 51. See *ante*.

No costs are recoverable in *Quare impedit*, because of the great damages given by the statute of *Westm. 2. c. 5.*

Where judgment is given to have a writ to the Bishop in *Quare impedit*, it shall not be reversed on writ of error brought on the whole judgment; though the judgment by the statute for damages be erroneous and reversed. *5 Rep. 58, 59.*

When one recovers in a *Quare impedit* against an Incumbent, the Incumbent is so removed by judgment that the recoverer may present without any thing farther; but the Incumbent continues incumbent *de facto*, till such presentation is made: and if the plaintiff in this suit be instituted on a writ to the Bishop, the defendant cannot appeal; if he doth, a Prohibition lies; because in this case, the Bishop acts as the King's Minister, not as a Judge. *2 Roll. Abr. 365: 1 Roll. Rep. 62.*

In a writ of *Quare impedit*, which is almost the only real action that remains in common use, and also in the assize of *darrein presentment*, and writ of right of advowson, (see title *Writ of Right*) the Patron only, and not the Clerk, is allowed to sue the disturber. But, by virtue of several acts of Parliament, there is one species of presentations in which a remedy, to be sued in the Temporal Courts, is put into the hands of the clerks presented, as well as of the owners of the advowson; viz. the presentation to such benefices as belong to Roman-Catholic Patrons; which, according to their several counties, are vested in and secured to the two Universities of this kingdom. See *stats. 3 Jac. 1. c. 5: 1 W. & M. st. 1. c. 26: 12 Ann. st. 2. c. 14: 11 Geo. 2. c. 17.* By the statute of *12 Ann. st. 2. c. 14. § 4.* particularly, a new method of proceeding is provided, viz. that, besides the writs of *Quare impedit*, which the Universities as Patrons are entitled to bring, they, or their Clerks, may be at liberty to file a bill in equity against any person presenting to such living, and disturbing their right of Patronage, or his *cestuy que trust*, or any other person whom they have cause to suspect: in order to compel a discovery of any secret trusts, for the benefit of Papists, in evasion of those laws whereby this right of advowson is vested in those learned bodies. And also (by *stat. 11 Geo. 2. c. 17.*) to compel a discovery whether any grant or conveyance said to be made of such advowson, were made *bona fide* to a Protestant Purchaser, for the benefit of Protestants, and for a full consideration; without which requisites every such grant and conveyance of any advowson or avoidance is absolutely null and void. This is a particular law, and calculated for a particular purpose: but in no instance, except this, does the Common Law permit the Clerk himself to interfere in recovering a presentation, of which he is afterwards to have the advantage. For, besides that he has no temporal right in him till after institution and induction, this exclusion of the Clerk from being plaintiff seems also to arise from the very great honour and regard which the law pays to his sacred function. See *3 Comm. c. 16;* and further titles *Advowson; Juris Utrum; Papists, &c.*

QUARE INCUMBRAVIT, A Writ which lieth against the Bishop, who, within six months after the vacation of a benefice confers it on his Clerk, whilst two others are contending at law for the right of presentation; to shew *why he hath incumbered* the church. *Reg. Orig. 32.*

Or it is a writ brought, after a recovery in *Quare impedit*, or assize of *darrein presentment*, against the Bishop who thus admits a Clerk,

notwithstanding the writ *Ne admittas* served on him. See titles *Ne admittas*; *Quare impedit*.

If a man hath a writ of right of advowson depending between him and another, and the church is void pendent the writ, the plaintiff shall not have a *Quare incumbravit* or *Ne admittas*, although the Bishop incumber the church; because the plaintiff shall not recover the presentation on this writ, but the advowson: and where he hath title to present he may do it; and have *Quare impedit*, if he be disturbed. *New Nat. Br.* 108, 109.

This writ may be brought after the six months; and if a plaintiff be nonsuit in a *Quare incumbravit*, he may have another writ, and vary from his first declaration, &c. *F. N. B.* 48.

After a *Ne admittas* delivered, if the six months pass, the Bishop may present his Clerk for lapse, and shall not be charged by the writ of *Quare incumbravit* for the presentation; but he cannot admit the Clerk of the other man, for that would be against the writ *Ne admittas* delivered to him. *F. N. B.* 48. But to prevent this he is usually made a defendant in the *Quare impedit*.

If the Bishop incumber the church, where there is no dispute about it, yet this writ *Quare incumbravit* lies; but according to the best opinions there ought to be a suit depending, though there is no actual recovery. 18 *E.* 3. 17: *Fitz. Q. Imped.* 3.

QUARE NON ADMISIT, A writ which lies against a Bishop where a man hath recovered his advowson or presentation, in a writ of right of advowson, or in *Quare impedit*, or other action, and the Bishop refuses to admit his Clerk, on pretence of lapse, &c. See title *Quare impedit*.

It is requisite in the writ to mention the recovery; and it is to be brought in the county where the refusal was. *F. N. B.* 47: 7 *Rep.*: *Dyer* 40.

In a *Quare non admisit* the plaintiff shall recover damages: and if the plaintiff have judgment in a *Quare impedit*, and a writ is awarded to the Bishop; if on this writ the Bishop makes a false return, the plaintiff may have *Quare non admisit* against him, and have his damages. *Dyer* 260.

King *Edw.* I. presented his Clerk to a benefice in *Yorkshire*, and the Archbishop of that province refused to admit him; on which the King brought a *Quare non admisit*, and the Archbishop pleaded that the Pope had a long time before provided for that church, as one having supreme authority; in that case, therefore he could not admit the King's Clerk. It was adjudged, that for his contempt to execute the King's writ, the Archbishopric should be seized, &c. 5 *Rep.* 12. See title *Præmunire*.

If the Bishop refuse the King's presentee, and afterwards admit him, yet the King shall have *Quare non admisit* for the refusal; and so it is presumed may a common person. *New Nat. Br.* 106.

QUARE NON PERMITTIT, An antient Writ which lay for one who had a right to present to a church for a turn, against the proprietary. *Fleta*, l. 5. c. 6.

QUARENTINE; QUARENTAINE; Quarentina.] A benefit allowed by Law to the widow of a man dying seized of lands, whereby she may challenge to continue in his capital messuage or chief mansion-house, (not being a castle,) by the space of *forty days* after his decease in order to the assignment of her dower, &c. And if the heir,

or any other, eject her, she may bring the writ *de quarentinâ habendâ*; but the widow shall not have meat, drink, &c. though if there be no provision in the house, according to *Fitzherbert*, she may kill things for her provision. See *Magna Charta*, cap. 7: *Bract. lib. 2. cap. 40: F. N. B.* 161: and this Dictionary, title *Dower* III.

QUARENTINE, The term of forty days, during which, the persons coming from foreign parts, infected with the plague, are not permitted to land or come on shore.

To this head may be referred the provisions of our laws against the *Plague*: an evil which, by the blessing of Providence, has not been inflicted on this kingdom for more than a century past. The *stat. 1 Jac. 1. c. 31.* still remains in force; and enables the Mayor, Justices, and Head-officers of the place infected, to make a rate for the relief of the unhappy sufferers, and to effect such regulations as shall be necessary to prevent the infection from spreading: and by that statute it is enacted, that if any person infected with the plague, or dwelling in any infected house, be commanded by the officer to keep his house, and shall disobey, he may be enforced by the watchmen appointed to obey such necessary command; and if any hurt ensue by such enforcement, the watchmen are indemnified. And if such person, so commanded to confine himself, goes abroad and converses in company, if he has no plague-sore upon him, he shall be punished as a vagabond, by whipping, and be bound to his good behaviour; but if he has any infectious sore upon him uncured, he shall be guilty of Felony.

By the acts 45 G. 3. c. 10. (repealing all former acts relating to Quarentine) and 46 G. 3. c. 98. a system of regulations is introduced and enforced in *Great Britain*. The system of Quarentine is regulated in *Ireland* by the *Irish* act 40 G. 3. c. 79.

By the acts 45 & 46 G. 3. certain duties are made payable by the owners of all vessels performing Quarentine. All ships, as well ships of war, as others, coming from or having touched at any place from whence the King, with the advice of the Privy Council shall have adjudged and declared it probable that the plague, or any other infectious disease may be brought, are made subject to Quarentine. The Privy Council may, from time to time, specify what ships or goods shall be subject to Quarentine, and make orders in case of any infectious disease appearing in *Great Britain*; as also for mitigating Quarentine in certain cases. Masters of ships, liable to Quarentine, are to make signals on meeting other ships at sea, or within four leagues of the coast; Penalty 200*l.*: and on the like penalty all masters of ships are to inform pilots of all the places at which they have touched or laden. Masters omitting to disclose their having touched at infected places, or to hoist the proper signals, are guilty of felony without Clergy. A penalty of 500*l.* is imposed on masters, &c. quitting vessels, or permitting persons to quit them, or not going to the places appointed for Quarentine; and 200*l.* and six months' imprisonment on persons coming in such vessels, or going on board them, who quit them till regularly discharged. The penalty of felony, without Clergy, is imposed on disobedience of persons under Quarentine, and on persons who, though not infected shall, after entering the place of Quarentine, escape therefrom. Goods liable to Quarentine shall be opened, and aired according to order of Council, of which a certificate shall be given, the forging of which is declared felony without Clergy: and the like penalty is imposed on landing or receiving goods

improperly from vessels under Quarentine. Many other regulations are introduced for the purpose of preventing the danger of public infection.

If a pilot quits the ship contrary to an order of the King in Council, he may be indicted for a misdemeanor, and punished at the discretion of the Court, on the ground of his violating the directions of a positive prohibitory statute. 4 *Term Rep. K. B.* 206.

QUARENTINE, likewise signifies a quantity of ground, containing forty perches. *Leg. Hen. 1. c.* 16.

QUARE OBSTRUXIT. A Writ which lay for him who, having a liberty to pass through his neighbour's ground, could not enjoy his right, because the owner had so obstructed it. *Fleta, lib. 4. c.* 26.

QUARREL, *Querela; a querendo.*] Extends not only to actions personal, but also to mixt; and the plaintiff in them is called *Querens*, and in most of the writs it is said *Queritur*; so that, if a man release all Quarrels, (a man's deed being taken most strongly against himself,) yet it is as beneficial as all *actions*, for by it all actions real and personal are released. 8 *Co.* 153: 1 *Inst. c.* 8. § 5. 11. See title *Release*.

QUARRELLING IN CHURCH OR CHURCHYARD. All affrays in a church, or churchyard, are esteemed very heinous offences, as being indignities to Him to whose service those places are consecrated; therefore mere quarrelsome words, which are neither an affray nor an offence in any other place, are penal here. For it is enacted by *stat. 5 & 6 Ed. 6. c.* 4. that if any person shall, by words only, quarrel, chide, or brawl in a church or churchyard, the Ordinary shall suspend him, if a Layman, *ab ingressu ecclesiæ*; and, if a Clerk in orders, from the ministration of his office during pleasure. And, if any person in such church or churchyard proceed to smite or lay violent hands on another, he shall be excommunicated *ipso facto*; or if he strike him with a weapon, or draw any weapon with an intent to strike, he shall, besides excommunication, (being convicted by a Jury,) have one of his ears cut off; or, having no ears, be branded with the letter F in his cheek. 4 *Comm.*

QUARTELOIS. Upper garments with coats of arms quartered on them, the old habit of *English* knights. *Walsing. in vit. Ed.* 2.

QUARTERISARI. To be *quartered*, or cut into four quarters in execution. *Artic. Richardi Serope Archiep. Ebor. apud Angl. Sac. par.* 2. 266. *Quarterization* is part of the punishment and execution of a *traitor*, by dividing his body into four quarters. See title *Treason*.

QUARTER-SEAL. The Seal kept by the director of the Chancery in *Scotland*. It is in the shape and impression of the fourth part of the Great Seal, and is in the Scotch statutes called the Testimonial of the Great Seal: Gifts of lands from the Crown pass this Seal in certain cases. *Bell's Scotch Dict.*

QUARTER SESSIONS, *Of the Peace*. A general Court held by two Justices of the Peace, one of which must be of the *Quorum*, in every county, once every quarter of a year; originally erected only for matters touching the breach of the Peace, but now its power is greatly increased, and extends much farther by many statutes.

The holding these Sessions quarterly was first ordained by *stat. 25 Edw. 3. stat. 1. c.* 8; and the particular times appointed by *stat. 36 Ed. 3. c.* 12.

By *stat. 12 R. 2. c.* 10. Justices are to hold their Sessions every

quarter of the year at least: And by *stat. 2 Hen. 5. c. 4.* this Court is appointed to be in the first week after *Michaelmas* day; the first week after the *Epiphany*; the first week after the close of *Easter*; and in the week after the translation of *Saint Thomas à Becket*, or the seventh of *July*.

In *Scotland*, by the act 1661. *c. 38.* these Sessions are to be held in that part of the kingdom on the first *Tuesdays* of *May*, *August*, and *March*, and the last *Tuesday* of *October*. See title *Sessions of the Peace*.

QUARTO DIE POST, The *fourth day* inclusive after the return of the writ; and if the defendant makes his appearance on this day, it is sufficient. See titles *Practice*; *Terms*.

QUASH, *Quassare*; *Fr. quasser*; *Lat. cassum facere*.] To overthrow or annul. *Bracton, lib. 5. Tract. 2. c. 3. nu. 4.* If the Bailiff of a liberty return any out of his franchise, the array shall be quashed. An array returned by one who hath no franchise shall be quashed. 1 *Inst.* 156.

The Court of *B. R.* hath power to quash orders of Sessions, *Presentments*, *Indictments*, &c. Though this quashing is by favour of the Court, and the Court may leave the party to take advantage of the insufficiency by pleading; as they generally do where an indictment is for an offence very prejudicial to the Commonwealth; as for perjury, &c. 2 *Lil. Abr.* 410. See further, titles *Indictment*; *Information*, &c.

QUASI-CONTRACT. An implied contract. See title *Assumpsit*.

QUAY; See *Ports*.

QUEEN, *Lat. Regina*; *Sax. Cwen*, i. e. *Uxor*, a wife; *frofter excellentiam*, the wife of the King.] The Queen of *England* is either Queen *Regent*, Queen *Consort*, or Queen *Dowager*. The Queen *Regent*, *Regnant*, or *Sovereign*, is she who holds the Crown in her own right; as the first (and perhaps the second) Queen *Mary*, Queen *Elizabeth*, and Queen *Anne*; and such a one has the same powers, prerogatives, rights, dignities, and duties as if she had been a King. This is expressly declared by *stat. 1 Mar. st. 3. c. 1*; See title *King*. But the Queen *Consort* is the wife of the reigning King; and she, by virtue of her marriage is participant of divers prerogatives above other women. *Finch. L.* 86.

She is a public person, exempt and distinct from the King; and not, like other married women, so closely connected as to have lost all legal or separate existence, so long as the marriage continues. For the Queen is of ability to purchase lands, and to convey them, to make leases, to grant copyholds, and do other acts of ownership, without the concurrence of her lord; which no other married woman can do. 4 *Rep.* 23. She is also capable of taking a grant from the King, which no other wife is from her husband. The Queen of *England* hath separate Courts and Officers, distinct from the King's, not only in matters of ceremony, but even of law; and her Attorney and Solicitor-General are entitled to a place within the bar of his Majesty's Courts, together with the King's Counsel. See title *Precedence*. She may likewise sue and be sued alone, without joining her husband. She may also have a separate property in goods as well as lands, and has a right to dispose of them by will. In short, she is in all legal proceedings looked upon as a feme sole, and not as a feme covert; as a single, not as a married woman. *Finch. L.* 86: *Co. Lit.* 133. For which the reason given is this: Because the wisdom of the Common Law

would not have the King (whose continual care and study is for the public, and *circa ardua regni*) to be troubled and disquieted on account of his wife's domestic affairs; and therefore it vests in the Queen a power of transacting her own concerns, without the intervention of the King, as if she was an unmarried woman. 1 *Comm.* c. 4.

The Queen Consort is of ability, without the King, to purchase, grant, and make leases; and may sue and be sued alone, in her own name only, by *precipe*, not by petition: She may have in herself the possession of personal things during her life, &c. But both her real and personal estate goes to the King after her death: If she doth not in her lifetime dispose of them, or devise them by will. *Co. Lit.* 3. 31. 133: *Finch.* 86: 1 *Roll. Abr.* 912.

By 39 & 40 G. 3. c. 88. it is expressly enacted, that the Queen Consort for the time being may during the joint lives of the King and of such Queen Consort, by deed or will, dispose of estates purchased by or in trust for her, or vested in her: and also bequeath all her chattels and personal estate as if she were sole; with the exception of places, &c. vested in her only for life.

Acts of Parliament relating to her, need not be pleaded; for the Court must take notice of them, because she is a public person. 8 *Reph.* 28.

If a tenant of the Queen aliens a part of his tenancy to one, and another part to another; the Queen may distrain in any one part for the whole, as the King may do. *Wood's Inst.* 22. And in a *Quare impedit* brought by the Queen, some say that plenarty is no plea; but see 2 *Inst.* 361.

By *stat. 2 Geo. 2. c. 27.* the Queen was constituted Regent of the kingdom, during the King's absence abroad; to be capable of the office, without taking the oaths, or doing any act required by Law to qualify any other.

The Queen hath also many exemptions, and minute prerogatives. For instance: she pays no toll: *Co. Lit.* 133; nor is she liable to any amercement in any Court. *Finch. L.* 185. But in general, unless where the Law has expressly declared her exempted, she is upon the same footing with other Subjects; being to all intents and purposes the King's Subject, and not his equal.

The Queen hath also some pecuniary advantages, which heretofore formed her a distinct revenue: As in the first place, she is entitled to an antient perquisite called *Queengold*; (*aurum reginæ*;) which is a Royal revenue, belonging to every Queen Consort during her marriage with the King, and due from every person who hath made a voluntary offering or fine to the King, amounting to ten marks or upwards, for and in consideration of any privileges, grants, licences, pardons, or other matter of Royal favour conferred upon him by the King: And it is due in the proportion of one tenth part more, over and above the entire offering or fine made to the King; and becomes an actual debt of record to the Queen's Majesty by the mere recording of the fine. *Pryn. Aur. Reg.* 2. As if an hundred marks of silver be given to the King for liberty to take in mortmain, or to have a fair, market, park, chase or free-warren: There the Queen is entitled to ten marks in silver, or (what was formerly an equivalent denomination) to one mark in gold, by the name of Queen-gold, or *aurum reginæ*. 12 *Reph.* 21: 4 *Inst.* 358. But no such payment is due for any aids

or subsidies granted to 'the King in Parliament or convocation; nor for fines imposed by Courts on offenders, against their will; nor for voluntary presents to the King, without any consideration moving from him to the Subject; nor for any sale or contract whereby the present revenues or possessions of the Crown are granted away or diminished. *Pryn.* 6.

The original revenue of our ancient Queens, before and soon after the Conquest, seems to have consisted in certain reservations or rents, out of the demesne lands of the Crown, which were expressly appropriated to her Majesty, distinct from the King. It is frequent in Domesday-book, after specifying the rent due to the Crown, to add likewise the quantity of gold or other renders reserved to the Queen. These were frequently appropriated to particular purposes; to buy wool for her Majesty's use, to purchase oil for her lamps, or to furnish her attire from head to foot, which was frequently very costly, as one single robe in the fifth year of *Henry II.* stood the city of *London* in upwards of fourscore pounds. And, for a farther addition to her income, this duty of *Queen-gold* is supposed to have been originally granted; those matters of grace and favour, out of which it arose, being frequently obtained from the Crown by the powerful intercession of the Queen. There are traces of its payment, though obscure ones, in the book of Domesday, and in the great Pipe-roll of *Henry I.* In the reign of *Henry II.* the manner of collecting it appears to have been well understood; and it forms a distinct head in the antient dialogue of the Exchequer written in the time of that Prince, and usually attributed to *Gervase of Tilbury*. From that time downwards it was regularly claimed and enjoyed by all the Queen *Consorts* of *England* till the death of *Henry VIII.*; though after the accession of the *Tudor* family the collecting of it seems to have been much neglected: And, there being no Queen *Consort* afterwards till the accession of *James I.*, a period of near sixty years, its very nature and quantity became then a matter of doubt; and, being referred by the King to the Chief Justices and Chief Baron, their report of it was so very unfavourable, that his consort Queen *Anne*, (though she claimed it) yet never thought proper to exact it. In 1635, 11 *Car. I.*, a time fertile of expedients for raising money upon dormant precedents in our old records, the King, at the petition of his Queen *Henrietta Maria*, issued out his writ for levying it; but afterwards purchased of his *Consort* at the price of ten thousand pounds; finding it, perhaps, too trifling and troublesome to levy. 19 *Rym. Fœd.* 721. And when afterwards, at the Restoration, by the abolition of the military tenures, and the fines that were consequent upon them, the little that legally remained of this revenue was reduced to almost nothing at all, in vain did Mr. *Prynne*, by a treatise which does honour to his abilities as an antiquary, endeavour to excite Queen *Catharine* to revive this claim.

Another antient perquisite belonging to the Queen *Consort*, mentioned by all our old writers, and therefore only worthy notice, is this; that on the taking of a whale on the coasts, which is a Royal fish, it shall be divided between the King and Queen; the head only being the King's property, and the tail of it the Queen's. The reason of this whimsical division, as assigned by our antient records, was to furnish the Queen's wardrobe with whalebone. *Bracton*, l. 3. c. 3: *Britton*, c. 17: *Flet.* l. 1. c. 45 & 46: *Pryn. Aur. Reg.* 127. It is remarked by

Mr. *Christian*, that the reason is more whimsical than the division, as the whalebone lies entirely in the *head*; which is the King's property.

The Revenue of our Queens, after the death of the King, is settled from time to time by statute: at present it is 100,000*l*. And by various statutes the King is enabled to make grants for her benefit. See *stats.* 2 *Geo.* 3. c. 1: 15 *Geo.* 3. c. 53: 47 *Geo.* 3. st. 2. c. 45.

Though the Queen is in all respects a Subject, yet, in point of the security of her life and person, she is put on the same footing with the King. It is equally treason (by the *stat.* 25 *Edw.* 3.) to compass or imagine the death of our Lady the King's companion, as of the King himself: And to violate, or defile the Queen *Consort*, amounts to the same high crime; as well in the person committing the fact, as in the Queen herself, if consenting. If however the Queen be accused of any species of treason, she shall (whether *Consort* or *Dowager*) be tried by the Peers of Parliament, as Queen *Ann Boleyn* was in 28 *Hen.* 8.

The husband of a Queen *Regnant*, as Prince *George* of *Denmark* was to Queen *Anne*, is her Subject; and may be guilty of High Treason against her: But, in the instance of conjugal infidelity, he is not subjected to the same penal restrictions.

A Queen *Dowager* is the widow of the King, and as such enjoys most of the privileges belonging to her as Queen *Consort*. But it is not high Treason to conspire her death; or to violate her chastity, because the succession to the Crown is not thereby endangered. Yet still, *pro dignitate regali*, no man can marry a Queen *Dowager* without special licence from the King, on pain of forfeiting his lands and goods. This *Coke* says, was enacted in Parliament in 6 *Hen.* VI., though the statute be not in print. See 2 *Inst.* 18: 4 *Inst.* 51. In *Riley's Plac. Parl.* 672. the bill with the Royal assent indorsed, is printed, and in *Cotton's Abridgment*, it is cited as nu. 27. of that year. It is not contained in the printed Parliament Rolls. The Queen *Dowager*, though an alien born, shall still be entitled to dower after the King's demise, which no other alien is. *Co. Lit.* 31. A Queen *Dowager*, when married again to a Subject, doth not lose her regal dignity, as Peeresses *dowager* do their Peerage when they marry Commoners. For *Catharine*, Queen *Dowager* of *Henry V.* though she married a private gentleman, *Owen ap Meredith ap Theodore*, commonly called *Owen Tudor*, yet, by the name of *Catharine* Queen of *England*, maintained an action against the bishop of *Carlisle*: And so the Queen *Dowager* of *Navarre*, marrying with *Edmond* Earl of *Lancaster*, brother to King *Edward I.*, maintained an action of dower after the death of her second husband, by the name of Queen of *Navarre*. 2 *Inst.* 50.

QUEEN ANNE'S BOUNTY. See title *First-Fruits*.

QUEEN-GOLD, *Aurum Reginae*.] See title *Queen*.

QUE ESTATE, *Which estate*.] A Plea, where a man entitling another to land, &c. saith that the same estate such other had. he has from him: As, for example, in a *Quare impedit*, the plaintiff alleges that two persons were seised of lands, whereunto the advowson in question was appendant in fee, and did present to the church, and afterwards the church was void: *Which Estate* of the two persons he hath now, by virtue whereof he presented, &c. *Broke* 175: *Co. Lit.* 121.

A man cannot plead a *Que estate* in an estate tail, nor can it be pleaded in estates for life, or for years; a *Que Estate* of a term may not be pleaded, by reason a term cannot be gained by disseisin, as a

fee may; but one may plead a *Que Estate* in a term in another person, under whom he doth not claim, and be good; for he is not privy to the estate of the stranger, to know his title. 1 *Rep.* 46: 1 *Lev.* 190: 3 *Lev.* 19: *Lutw.* 81.

A thing which lies in grant, cannot be claimed by a *Que Estate*, directly by itself; yet it may be claimed as appurtenant to a manor, by *Que Estate* in the manor. 1 *Mod.* 232.

A man may not prescribe by a *Que Estate* of a rent, advowson, or toll; but he may of a manor, &c. to which these are appendant. 2 *Mod.* 144: 3 *Mod.* 52.

A person cannot plead a *Que Estate*, without shewing the deed how he came by it. *Cro. Jac.* 673. This is in case of a rent in gross, or lands, which cannot pass from one man to another without deed. *Jenk. Cent.* 26. See this Dictionary, title *Prescription*.

QUE EST EADEM;

QUE EST LE MESME;

} See *Quæ est eadem*, &c.

QUEM REDDITUM REDDAT. A judicial Writ which lies for him to whom a rent-seck, or rent-charge is granted, by fine levied in the King's Court, against the tenant of the land who refuseth to attorn to him, thereby to cause him to attorn. *Old Nat. Brev.* 126: *West. Symbol. par.* 2. tit. *Fines*, § 156.

QUERELA. An action preferred in any Court of Justice, in which the Plaintiff was *querens* or complainant, and his Brief complaint or declaration was called *Querela*, whence our *Quarrel* against any person.

Quietus esse à Querclis was to be exempted from the customary fees paid to the King or Lord of a Court, for the purchase of liberty to prefer such an action. But more usually to be exempted from fines and amercements imposed for common trespasses and faults. *Paroch. Antiquit.* 123. See *Kennet's Glossary*; and *ante*, tit. *Quarrel*.

QUERELA CORAM REGE ET CONSILIO DISCUTIENDA ET TERMINANDA; A Writ whereby one is called to justify a complaint of trespass made to the King himself, before the King and Council. *Reg. Orig.* 124.

QUERELA FRESCE FORTIÆ; See *Fresh Force*.

QUEST, *Questa*.] Inquest, inquisition or inquiry on the oaths of an impanelled Jury. *Cowell.* See *Inquest*.

QUESTION, or *Torture*; See title *Mute*.

QUESTMEN; See title *Churchwardens*.

QUESTUS EST NOBIS, the form of a writ of *Nusance*, which by the equity of the *stat.* 13 *Ed.* 1. c. 24. lay against him to whom the house or other thing which occasions the nuisance, is alienated; whereas before the statute this action lay only against him who first levied the thing to the annoyance of his neighbour. *Cowell*.

QUIA DOMINUS REMISIT CURIAM; See title *Writ of Right*.

QUIA EMPTORES, Statute of; The *stat. Westm.* 3. 18 *E.* 1. st. 1. is so called from the introductory words. See titles *Statute*; *Tenures*; *Manor*, &c.

QUIA IMPROVIDE, A *Supersedeas* granted in behalf of a Clerk of the Chancery, sued against the privilege of that Court in the Common Pleas, and pursued to the *exigent*. So in many other cases where a writ is erroneously or *improvidently* sued. See *Dyer* 33 n. 18.

QUICK WITH CHILD; See *Execution of Criminals*.

QUICK-SETS, Damage sustained by destroying, burning, or de-

facing them, shall be compensated for by the inhabitants of the place, in the same manner as for dykes, &c. overthrown in the night. *Stat. 13 Ed. 1. st. 1. c. 46.* See title *MISCHIEF, Malicious.*

QUID JURIS CLAMAT, A judicial writ issuing out of the Record of the *fine*, which remaineth with the *Custos Brevium* of the Common Pleas, before it be engrossed; and it lies for the grantee of a reversion or remainder when the particular tenant will not attorn. *West. Symbol. part 2. tit. Fines, § 118: Reg. Judic. 36. 571.* See 18 *Vin. Abr.* 143.

After the *fine* is engrossed, the cognisee shall not have a *Quid juris clamat* against tenant for life: But the course is when he in reversion, on the Writ of covenant sued against him, maketh recognizance of the reversion by *fine*, &c. then on that the cognisee may have this writ against tenant for life; and if he be sick or not able to travel, a *dedimus potestatem* shall be granted to take his cognizance, and to certify the same into *C. B.* When, after plea pleaded the tenant may make Attorney; and if he be adjudged to attorn, a *distringas ad attornandum* shall be awarded against him, &c. *New Nat. Br.* 328. This writ seems to be obsolete and disused, since the *stat. 4 & 5 Ann. c. 16. § 9, 10.* See title *Attornment.*

QUID PRO QUO, The mutual consideration and performance of both parties to a contract. *Kitch.* 184. And as this is the consideration of a good and binding contract or bargain, so that which is contrary to it, is what the Law calleth *Nudum factum.* 4 *Repl.* 83: *Dyer* 98. See titles *Consideration; Agreement.*

QUIETANTIA, *Acquietantia.*] See *Acquittance.*

QUIETARE, To quit, acquit or discharge, or save harmless.

QUIETE CLAMARE, to quit-claim, or renounce all pretensions of right and title. *Bract. lib. 5.*

QUIETUS; Freed or acquitted; A word made use of by the Clerk of the pipe and Auditors in the Exchequer in their discharge given to Accountants; usually concluding with *abinde recessat quietus*, which is called a *Quietus est*: A *Quietus est* granted to the Sheriff, will discharge him of all accounts due to the King. *Stat. 21 Jac. 1. c. 5.* See title *Sheriff.* And these *Quietus's* are mentioned in the Acts of general pardon.

QUIETUS REDDITUS; See *Quit-Rent.*

QUINQUAGESIMA SUNDAY, *Shrove-Sunday*; so named because it is about the fiftieth day before *Easter.*

QUINQUE PORTUS; See title *Cinque Ports.*

QUINSIEME, or **QUINZIME**; See title *Fifteenths.*

Sometimes this word *Quinsime*, or *Quinzime*, is used for the fifteenth day after any feast, as the *Quinzime* of *St. John Baptist.* *Stat. 13 Ed. 1.* in the preamble.

QUINTAL, or **Kintal**, *Quintalus.*] A weight of lead, iron, &c. usually 100lbs. at six score *per cent.* *Cowell. Plowden* mentions 2000 *Kintals* of wood.

QUINTANE, *Quintena.*] A Roman military sport or exercise, by men on horseback, formerly practised in this kingdom to try the agility of the country youth: it was tilting at a mark made in the shape of a man to the navel in his left hand having a shield, in his right a wooden sword; the whole made to turn round, so that if it was struck with the lance in any other part but full in the breast, it turned with the force of the stroke, and struck the horseman with the

sword which it held in its right hand. This sport is recorded by *Mat. Paris*, anno 1253.

QUINTO EXACT' *Quintus exactus*, mentioned in *stat. 31 Eliz. c. 3.*] The fifth and last call of the defendant, who is sued to outlawry, when, if he appear not, he is by the judgment of the coroners returned outlawed; if a woman, waived. See titles *Exigent*; *Outlawry*.

QUI TAM, See titles *Action Popular*; *Information*.

QUIT-CLAIM, *Quieta clamantia*.] A release or acquitting of a man, from any action which the releaser hath, might, or may have against him. Also a quitting of one's claim or title. *Bracton*, lib. 5. tract 5. c. 9. num. 6; lib. 4. tract 6. c. 13. num. 1. See title *Release*.

QUIT-RENT, *Quietus Redditus*.] A certain small rent, payable by the tenants of manors, in token of subjection, by which the tenant goes quiet and free: In antient records, it is called *White-rent*; because paid in silver money, to distinguish it from rent-corn, &c. 2 *Inst.* 19. See titles *Alba-firma*; *Chief-Rents*; *Rents*.

QUOAD HOC, A term often used in Law Reports, to signify, as to the thing named the Law is so, &c.

QUOD CLERICI, *Beneficiati de Cancellaria*.] A Writ to exempt a Clerk of the Chancery from the contribution towards the Proctors of the Clergy in Parliament. *Reg. Orig.* 261.

QUOD CLERICI NON ELIGANTUR IN OFFICIO BALLIVI, &c. A Writ which lies for a Clerk, who, by reason of some land he hath, is made, or about to be made bailiff, beadle, reeve, or some such officer. See *Clerico infra sacros*, &c. *Reg. Orig.* 117: *F. N. B.* 261.

QUOD CUM, *That Whereas*.] This being by way of recital, and not positively, is not good in indictments. 3 *Salk.* 188. See title *Indictment*.

QUOD EI DEFORCEAT, A Writ for tenant in tail, tenant in dower, by the curtesy, or for term of life, having lost their lands by default, against him who recovers, or his heir. *Reg. Orig.* 171: *Stat. Westm.* 2. c. 4.

Quod ei deforceat may be brought against a stranger to the recovery; as if a man recover by default, and maketh a feoffment, this writ may be had against the feoffee.

If a woman lose by default, and taketh husband, she and her husband shall have the *Quod ei deforceat*, but where tenant in tail loseth by default, and dieth, his heirs shall not have a writ of *Quod ei deforceat*, but a *Formedon*: And if husband and wife lose by default the land of the wife, which she holdeth for term of life, and the husband dieth, she may not have this writ, for *cui in vita* is her remedy; and when one bringeth *Quod ei deforceat*, he counts that he was seised of the land in his demesne, as of freehold, or in tail, &c. without shewing of whose gift he was seised; also he ought to allege *esplees* in himself, and then the defendant is to deny the right of the plaintiff, &c. and shew how that at another time he recovered the land against the plaintiff, by *Formedon*, or other action: and shall say in the end of his plea, *Quod ipse paratus est ad manutenendum jus & titulum suum predict. per donum, &c. unde petit judic. &c.* *New Nat. Br.* 347. 349.

If tenant in tail, or such other tenant, who hath a particular estate, lose by default, where he is not summoned, &c. he may have either a writ of *Disceit*, or *Quod ei deforceat*. *Ibid.* See 16 *Vin. Abr.* 145. 148; and this Dict. titles *Writ of Right*; *Recovery*.

QUOD PERMITTAT; A Writ which lies for the heir of him who is

disseised of his common of pasture, against the heir of the disseisor, being dead. *Terms de Ley*.

And according to *Broke*, this writ may be brought by him whose ancestor died seised of common of pasture, or other like thing annexed to his inheritance, against the deforçant: If a man is disturbed by any person in his common of pasture, so that he cannot use it, he shall have a *Quod permittat*; so of a turbary, piscary, fair, market, &c. *New Nat. Br.* 272, 273. 275, 276. And a person may have a *Quod permittat* against a disseisor, &c. in the time of his predecessor.

The writ *Quod permittat* on a disseisin of common of pasture, directed to the Sheriff, *Commands* A. that justly, &c. he permit B. to have common of pasture in, &c. which he ought to have, as it is said; and unless he shall do it, &c. then summon, &c. *Reg. Orig.* 155. See further, 18 *Vin. Abr.* and this Dictionary, title *Common* III.

QUOD PERMITTAT PROSTERNERE; A Writ which lieth against any person who erects a building, though on his own ground, so near to the house of another, that it hangs over, or becomes a nuisance to it. 2 *Lill. Abr.* 413.

Formerly where a man built a wall, a house, or any thing which was a nuisance to the freehold of his neighbour, and afterwards died; in such case he who received any damage thereby, sued a *Quod permittat* against the heir of him who did the nuisance; and the form of it was *Quod permittat prosternere murum, &c.* 3 *Nels. Abr.* 44.

At the Common Law, an assise of nuisance did not lie against the alienee of a wrong-doer, for the purchaser was to take the land in the same condition it was conveyed to him; but by the statute of *West. 2. c. 24.* damages may be recovered against the person who sold the land, if the nuisance be not abated on request made to him; or against the person to whom he sold it; though this doth not extend to the alienee of the alienee. 3 *Nels. 45. Lutw.* 1588. This writ is seldom brought, being turned into action on the case. See title *Nuisance* III. 3.

QUOD PERSONA NEC PREBENDARIJ, &c. A writ which lay for spiritual persons who were distrained in their spiritual possessions, for payment of a *fifteenth* with the rest of the parish. *F. N. B.* 176.

QUO JURE, A writ which lies for him who has land, wherein another challengeth common of pasture time out of mind: And is to compel him to shew by what title he challenges it. *F. N. B.* 128; and *Britton*, more largely, c. 59: *Reg. Orig.* 156.

This is now out of use, as, on the claimant's putting his cattle in, the owner may bring trespass, when the claimant must plead and prove his title. See title *Common of Pasture*.

QUO MINUS, A writ which lies for him who hath a grant of *house-bote*, and *hay-bote* in another man's woods, against the grantor, making such waste whereby the grantee can the less enjoy his grant. *Old Nat. Br.* 148.

This writ also lies for the King's farmer in the Exchequer, against him to whom he selleth any thing by way of bargain touching his farm, or against whom he hath any cause of personal action. *Perkins, Grants*, 5. For he supposeth, by the vendee's detaining any due from him, he is made less able to pay the King's rent.

Formerly it was allowed only to such persons as were tenants or debtors to the King; as this day the practice is become general for the plaintiff to surmise, that, for the wrong which the defendant doth

him, he is less able to satisfy his debt to his Majesty; which surmise gives jurisdiction to the Court of Exchequer, to hear and determine the cause. *Finch.* 66: *Old Nat. Br.* 148. See titles *Exchequer*; *Process*.

QUONIAM ATTACHIAMENTA; One of the oldest books of the *Scotch Law*: so called from the two first words of the volume. The *Regiam Majestatem* is another instance of the like kind.

QUORUM, Lat.] Certain individuals, among persons invested with any power, or with the exercise of any jurisdiction, without whom any number of the others cannot proceed to execute the power given by the commission. The word occurs in our statutes, and commissions both of the peace and others, but particularly in commissions to Justices of the Peace; and a Justice of the Quorum is so called, from the words in the commission, *Quorum A. B. unum esse volumus*: As where a commission is directed to five persons, of whom *A. B.* and *C. D.* to be two: In this case *A. B.* and *C. D.* are said to be of the Quorum, and the rest cannot proceed without them. See title *Justices of the Peace II.*

QUORUM NOMINA. In the reign of *Hen. VI.* the King's Collectors, and other Accountants, were much perplexed in passing their accounts, by new extorted fees, and forced to procure a then late-invented writ of *Quorum Nomina*, for the allowing and suing out their *quietus* at their own charge, without allowance of the King. *Chron. Angl.*

QUOT, One twentieth part of the moveable estate of a person dying in *Scotland*, anciently due to the Bishop of the diocese where he resided. This is prohibited by the Scotch act 1701. c. 14.

QUOTA, A tax to be levied in an equal manner.

QUO WARRANTO.

A Writ which lies against any person, or Corporation, that usurps any franchise or liberty against the King, without good title; and is brought against the usurpers, to shew by what right and title they hold or claim such franchise or liberty: It also lies for misuser or nonuser of privileges granted; and by Bracton, it may be brought against one who intrudes himself as heir into land, &c. *Old Nat. Br.* 149.

A Writ of *Quo Warranto* is in the nature of a Writ of Right for the King, against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claim, in order to determine the right. *Finch. L.* 322: 2 *Inst.* 282. It lies also in case of nonuser or long neglect of a franchise, or misuser or abuse of it; being a writ commanding the defendant to shew by what Warrant he exercises such a franchise, having never had any grant of it, or having forfeited it by neglect or abuse. This was originally returnable before the King's Justices at *Westminster*; but afterwards only before the Justices in *Eyre*, by virtue of the statutes of *Quo Warranto*, 6 *Ed.* 1: 18 *Ed.* 1. stat. 2: but since those Justices have given place to the King's temporary commissioners of Assize, the Judges on the several circuits, this branch of the statutes hath lost its effect; and writs of *Quo Warranto* (if brought at all) must now be prosecuted and determined before the King's Justices at *Westminster*. See 2 *Comm.* c. 17; and *Kydd's Law of Corporations*, ii. c. 4. § 3.

The judgment on a writ of *Quo Warranto* (being in the nature of

a writ of right) is final and conclusive even against the Crown. 1 *Sid.* 86: 2 *Show.* 47: 12 *Mod.* 225: *Kel.* 139. This, together with the length of its process, probably occasioned that disuse into which it is now fallen; and introduced a more modern method of prosecution, by information filed in the Court of King's Bench by the Attorney General, in the nature of a writ *Quo Warranto*; wherein the process is speedier, and the judgment not quite so decisive. This is properly a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him, or seize it for the Crown: but hath long been applied to the mere purposes of trying the civil right, seizing the franchise, or ousting the wrongful possessor; the fine being nominal only. 2 *Comm. c.* 17.

This proceeding is now applied to the decision of corporation disputes between party and party, without any intervention of the prerogative, by virtue of the *stat. 9 Ann. c.* 20. which permits an information in nature of a *Quo Warranto* to be brought, with leave of the Court, at the relation of any person desiring to prosecute the same, (who is then styled the *Relator*,) against any person usurping, intruding into, or unlawfully holding any franchise or office in any city, borough, or town corporate; provides for its speedy determination; and directs that, if the defendant be convicted, judgment of ouster (as well as a fine) may be given against him, and that the relator shall pay or receive costs according to the event of the suit.

The Form of this Information is thus:

"A. B. Attorney-General of the Lord the King, who sues for the Lord the King in this behalf, comes here into the Court of our said Lord the King, before the King himself, at Westminster, on ——— in this same term; and for the said Lord the King gives the Court here to understand and be informed, that ——— for the space of ——— now last past, and more, have used, and still do use, without any warrant or royal grant, the following liberties and franchises, to wit, ———: Of all which liberties, privileges, and franchises aforesaid, the said ———, during all the time aforesaid, have usurped, and still do usurp, upon the said Lord the King, to the great damage and prejudice of his royal prerogative: Whereupon the said Attorney of the said Lord the King, for the said Lord the King, prays the advice of the Court in the premises, and due process of Law against the said ——— in this behalf to be made, to answer to the said Lord the King, BY WHAT WARRANT he claims to have, use, and enjoy the liberties, privileges, and franchises aforesaid."

This is the form, whether the information be brought for an usurpation without any original title, or for a subsequent forfeiture, where the original title is not disputed. See *Co. Ent.* 527—564.

An information in the nature of a *Quo Warranto*, lies for acting as a trustee, under an act of Parliament without due appointment. 1 *Strange* 299. Against one for usurping the office of Steward of a Court-Leet. *Ibid.* 621. For erecting a new office. 2 *Strange* 336. For the office of Constable, *Ibid.* 1213. For a Ferry. *Ibid.* 1161. But not for erecting a warren. 1 *Strange* 637. Nor for the office of Churchwarden. *Ibid.* 1196.

The process usually awarded on the roll against individuals, whether claiming to act as a Corporation, or claiming any other franchise, is a *venire facias*, sometimes with a clause of *non omittas*, and sometimes without.—The entry, immediately after the conclusion of the information, is thus, "*Whereupon the Sheriff is commanded, that he*

cause to come;" or, "that he omit not, &c. but that he cause to come, &c. to answer," &c.

If the defendants do not appear at the day, the next process awarded is a *distringas*. Against a Corporation, not prosecuted for acting as a Corporation, but for usurping other liberties, the first process awarded is a *distringas*, and the entry on the roll in this form: "*Whereupon it is agreed, that the aforesaid Mayor and Commonalty, and Citizens of ——— be distrained by all their lands, &c. so that, &c. to answer to our Lord the King in the premises; and the Sheriff is commanded, that he distrain them in form aforesaid, so that, &c. at such a day.*" Co. Ent. 536. a.

Though a *venire facias* and *distringas* are the process usually awarded on the roll, yet it seems that against *individuals* who cannot be personally served with the *venire*, process of outlawry lies. See Cro. Jac. 528. 531.

When the defendant appears, he may either disclaim or plead as to all the franchises mentioned in the information; or he may plead as to part, and disclaim as to part.

If he disclaim as to all, the entry is in this form:

"*The said ———, protesting that the information aforesaid is not sufficient in Law, and that he is not under any necessity by the Law of the land to answer thereto, for plea nevertheless, saith, that he never used the aforesaid liberties, privileges, and franchises, nor any of them, nor in the same, or any of them, ever usurped upon the said Lord the King, in manner and form as by the said information is supposed, but the same, and every of them, disclaims and disavows; whereupon he prays judgment, and that he may be dismissed by the Court.*" Co. Ent. 527. b.

If he plead as to part, and disclaim as to part, the entry of the disclaimer, after the plea, is in this form:

"*And as to the residue of the liberties, privileges, and franchises in the said information above specified, upon the said Lord the King supposed to be usurped by the said ———, the said ——— says that he never used, nor does he now use the residue,*" &c. Co. Ent. 529, b.

Where the defendant pleads, the entry is in this form:

"*The said ———, as to the aforesaid liberty, &c. of ———, says, &c. ———. Here he sets out his title to the particular franchise; and so of every other claimed by a distinct title, and concludes his plea as to each, in this manner: And BY THIS WARRANT the said ——— has used, during all the time aforesaid, in the said information mentioned, and still uses the liberties, privileges, and franchises of ——— as he well might and still may: WITHOUT THIS that the said ——— has usurped, or now does usurp the said liberties, &c. on the said Lord the King, in manner and form as by the information aforesaid, for the said the Lord the King is above supposed: All which the said ——— is ready to verify, as the Court, &c. Whereupon he prays judgment, and that all and singular the liberties, &c. above by him, as aforesaid claimed, may be allowed and adjudged to him, and that he may thereupon be dismissed from this Court.*" See Co. Ent.

The Attorney-General then demurs or replies, and the subsequent proceedings are in the same manner as in civil actions.

In a *Quo Warranto* to shew by what authority a person claimed to have a *Court-Leet*, and alleging farther, *quod usurpavit libertatem sine aliquâ concessione*, &c. defendant pleaded *Non usurpavit*; and it was objected that this was no good plea, for the answer to *Quo Warranto*

is either to claim or disclaim; but the better opinion was, that by this plea defendant had answered the usurpation, though it did not shew by what title he claimed. *Godb. 91.*

In *Quo Warranto* for using a *fair* and *market*, and taking *toll*, issue was taken, whether they had toll by prescription, or not; and it was found they had; it was moved in arrest of judgment, that here was a discontinuance, because there was no issue as to the other liberties claimed: But it was held, they were too soon to make this objection, and that there can be no discontinuance against the King before judgment; for, by virtue of his prerogative, the Attorney-General may proceed to take issue on the rest, or may enter a *nolle prosequi*; but if he will not proceed, the Court may make a rule on him *ad repliandum*, and then there may be a special entry made of it. *Hardres 504.*

The judgment seems to be the same, and subject to the same varieties as on the writ of *Quo Warranto*.

If it be given in favour of the defendant, the entry is in this form: "*It is considered, that the liberties, &c. be allowed to the said ———*"; or thus: "*The said ——— may use, have, and enjoy all the said, &c. and that the said ——— as to the said premises may be dismissed from this Court: SAYING always the right of the said Lord the King, if hereafter,*" &c.

This *salvo jure* for the King, says *Coke*, serveth for any other title than that which was adjudged; and therefore *William de Penrugge*, the King's Attorney for prosecuting a *Quo Warranto* against the Abbot of *Fischamp* for franchises within the manor of *Steyning*, *sine precepto*, was committed to gaol. *1 Inst. 282.*

On disclaimer, by the defendant, the Attorney-General prays, "*That whereas the said ———, by his plea, has disavowed and disclaimed all and singular the liberties, &c. above specified, judgment may be given for the King; and that the said ———, with the said liberties and franchises, or any of them, may no way intermeddle, but may hereafter be altogether excluded from the same;*" and judgment is accordingly given in that form. *Co. Ent. 27, b.*

With respect to the form of the judgment for the King, when it is given on the defendant's pleading, there has been much difficulty and dispute.

In the Year-book of the 15 *Ed. 4.* this rule is laid down, "That where it clearly appears to the Court, that a liberty is usurped by wrong, and exercised on no title, either by the King's grant or otherwise, judgment only of ouster shall be entered: But that where it appears, that the King or his ancestors have once granted a liberty, and the liberty is forfeited by misuser or nonuser, the judgment shall be, that it be seized into the King's hands." And the reason given for the distinction is, that where the liberty or franchise has been usurped, the King cannot have that which never legally existed; but, in cases of an abuser or nonuser of a franchise once lawfully granted, the King resumes that which originally flowed from his bounty; and this course in the latter case, it has been said, is most beneficial for the Subject, who though by forfeiture, mispleading, or default, he may lose his liberty, may have recourse to the King's mercy for restitution. See 15 *E. 4. 7, b: Sawyer's Arg. Quo Warranto 17: 5 Term. Rep 551.*

From this it would seem, that the only cases in which judgment of ouster only ought to be given is, where there is no colour of title in

the defendant; or where a franchise is claimed by prescription, but it is such, that by Law it cannot be so claimed; or where it is not such a franchise as may subsist in the hands of the Crown. See 3 *Comm. c.* 17. cites *Cro. Jac.* 259: 1 *Show.* 280.

So if a man claim to hold a Court-Baron in virtue of a manor held by copy of another manor; there, judgment of ouster *only* shall be given, because a copyholder, being only tenant at will, cannot hold a Court-Baron to have forfeitures, and hold pleas in a writ of right. *Cro. Jac.* 259.

But where there is a colour of title, but the pleading of the defendant is defective, there is only judgment of *seizure*, and not of *ouster*. See 9 *Co.* 24, a: *Co. Ent.* 43, a: *Sawyer's Arg.* 17.

Where grants appear, but either the parties are not capable of taking, or their liberty or privilege granted is not allowable by Law, the course has been to enter a mixt judgment both of seizure and ouster. *Sawyer's Arg.* 17: *Co. Ent.* 537. 539, a: *Palm.* 1. 2 *Roll. Ref.* 113.

In addition to the judgment of seizure or of ouster, or of seizure and ouster, except only in the case of ouster on disclaimer, there is also judgment, that the defendants be taken to make fine to the King for the usurpation. And in this respect, it seems the judgment in the information, differs from that in the writ, of *Quo Warranto*; for in the latter, it is apprehended, there could be no judgment of *caspias pro fine*: The defendant was in the nature of a plaintiff; he made his claim; if he failed in making it good, the judgment was not *caspias pro fine*, but *quod sit in misericordia*. *Rast. Ent.* 540. a. *pl.* 1.

Upon *Quo Warranto*, when liberties are seized *quousque*, &c. and they are not replevied, the course is, that judgment final be given, *nisi* the defendants plead within such a time. *Comberbach* 18, 19.

Wherever judgment is given for the King on a *Quo Warranto*, for liberties usurped, the judgment is *Quod extinguantur*, and that the usurpers *libertates*, &c. *nullatenus intromittant*; and in such case the writ must be brought against particular persons: But where the *Quo Warranto* is for a liberty claimed by a Corporation, there it is to be brought against the body politic; and the liberties may be seized, but the Corporation still subsists, and is not dissolved without cause of forfeiture. 4 *Mod.* 52. 58.

A judgment of seizure cannot be proper where a thing is dissolved: And the judgment in the *Quo Warranto* against the city of London, seems contradictory, for the first part of it is, *quod libertates & franchisiæ capiantur & seisantur in manus Regis*; and the latter part of it is, *quod capiantur ad satisfaciend' Domino Regi de fine suo pro usurpatione libertat'*, &c. And the Corporation was not thereby dissolved, for it implied that they were not extinguished. 4 *Mod.* 52. 58. See title *London*; and under that title particularly as to the abuses of the Information by *Quo Warranto*.

After judgment, the regular course is to issue a writ of seizure to the Sheriff, which after reciting the proceedings in the *Quo Warranto*, commands him to seize the liberties into the King's hands. But this writ in point of fact, has not always issued. See *Co. Ent.* 539, b.

Where several franchises are granted by the same charter, and one is subordinate and inseparably incident to the other, the forfeiture of the principal is the forfeiture of the subordinate and incident; but

when the franchises are independent, and the one may stand without the other, the forfeiture of the one is not the forfeiture of the other. *Palin.* 82.

Where a *Quo Warranto*, or an information in the nature of it, is brought for several franchises, it is as several writs or several informations, to which there may be several pleas and several judgments; because the defendant may claim one franchise by one title, and another by another. *Palm.* 7, 8.

It has been adjudged, that the *stat. 4 & 5 W. & M. c. 18.* by which informations in the Crown-Office are not to be sued without express orders in open Court, &c. being a remedial Law, extends to informations in the nature of a *Quo Warranto*, which always suppose the usurpation of some franchise. See *Kydd's Law of Corporations*, ii. 410, &c. 415, &c.; and this Dictionary, title *Information* I. IV.

This statute, and the *stat. 9 Ann. c. 20.* leave the power of the Attorney-General with respect to filing informations, whether in the nature of *Quo Warranto*, or not, exactly as it was at Common Law; for *stat. 4 & 5 W. & M. c. 18.* expressly provides, that it shall not be construed to extend to any other information than such as shall be exhibited in the name of their Majesties' Coroner or Attorney in the Court of King's Bench for the time being, commonly called the Master of the Crown-Office: And *stat. 9 Ann. c. 20.* only introduces some provisions with respect to informations in cases within the meaning of it, filed in the name of the latter officer. In point of fact there are several Records in the Crown-Office, of informations in the nature of *Quo Warranto*, filed in the name of the Attorney-General, in the intermediate time between the two statutes, and since the passing of the last, as well in cases within the meaning of the last, as in other cases. 2 *Kydd's Corp.* 415, &c.

The distinction between the power of the Attorney-General and the Master of the Crown-Office, seems to be this; that the power of the latter is confined to cases which concern the Public Government; whereas that of the former extends, also, to cases which only concern the private rights of the Crown. 2 *Ld. Raym.* 1409: *Hardw.* 261: *Stra.* 637: 3 *Burr.* 1814. 1817. See 2 *Kydd's Corp.* 417, &c.

The *stat. 9 Ann. c. 20.* gives full costs, on verdict or judgment, to the successful party, whether relator or defendant; but it is only in case of verdict or judgment that, under this statute, the defendant can have costs for a groundless prosecution; but it has been decided, that, if the prosecutor do not, at his own costs, procure the information to be tried within a year after issue joined, the defendant is entitled to the benefit of the recognizance under the statute of *William and Mary*. See further, title *Information* I.

What cases are within the meaning of the statute has been the subject of some controversy, as the successful party is entitled to his costs only in such cases.

The words of the statute are, the "offices of Mayors, Bailiffs, Portreeves, and other offices within cities, towns-corporate, boroughs, and places:" one question has been, whether these words express only corporation-officers, or whether they extend to officers in boroughs and other places not corporate. And it seems on the whole decided, that the word *places* in the act only extends to offices in places of the same kind with those before enumerated.

It has likewise been urged, that there is a material difference be-

tween the case of a person who is compellable to take upon himself a burdensome office, which he could not refuse without being liable to an indictment, and that of a person who voluntarily undertakes an office from which he expects personal importance or some other advantage; and that it is unreasonable that a person, supposed to be elected into an office of the first description, should be liable to pay the costs of a prosecution for ousting him, on account of some defect in his election. 5 *Term Rep.* 375.

Such information will lie for the office of Bailiff of a Court-Leet, being a principal officer, having a power to summon and select the Jury. 2 *East's Rep.* 308.

The cases in which informations in the nature of *Quo Warranto* are granted under this act are, where a man exercises a corporate franchise, or acts as a corporate officer, without having been duly elected and sworn or admitted, and where the office of a corporate officer becomes void by something subsequent, as a motion, *McC. Kydd's Corp.* 424.

As this statute, 9 *Ann. c.* 20, extends only, as regards costs, to cases where the title of a person to be a corporate officer, as mayor, bailiff, or freeman, is in question; an information to try the right of holding a Court, is therefore not within it; but stands upon the Common Law only: and, being a prosecution in the name of the King, no costs are given. 1 *Burr.* 402.

To subject a man to an information in nature of a *Quo Warranto*, it is necessary that there should be not only a claim, but an user of the franchise. See *Sayer* 245: 5 *Term Rep.* 85.

Where the only act done by the party, against whom an application is made for leave to file an information in the nature of *Quo Warranto*, is voting in an election for Members of Parliament, under any claim of right, the Court will refuse it; on the ground that an inquiry into the right of voting belongs, more properly to the House of Commons. 1 *Stra.* 547.

But an information, in the nature of *Quo Warranto*, will lie against a person claiming to have a right of voting, by virtue of a burgage tenement. 3 *Term Rep.* 599, n.

The Court of King's Bench, having a discretionary power of granting informations in the nature of *Quo Warranto*, had long ago established a general rule to guide their discretion, as to the time for applications of this nature, *viz.* not to allow in any case such information against a person who had been twenty years in the possession of his franchise; but having reason to consider this time as too extensive, they by degrees restrained it, by analogy to the Statute of Limitations; and resolved not to allow such information against any person who had been *six* years in possession. See 4 *Burr.* 1962. 2022. 2120. 2523: *Cowp.* 75: 1 *Term Rep.* 1. 4: 2 *Term Rep.* 767: 4 *Term Rep.* 282. 4. And at length the Legislature confirmed this regulation, and extended it to informations filed by the Attorney-General. By *stat.* 32 *Geo.* 3. *c.* 58. it is enacted, that to any information in the nature of *Quo Warranto*, for the exercise of any corporate office of franchise, the defendant may plead that he has been in possession of, or has executed the office for six years or more. And it is by the same act provided, that no defendant shall be affected by any defect in the title of the person, from whom he derives his right and title, if that person has been in the undisturbed exercise of his office, or franchise, six years previous to the filing of the information.

This latter provision must be considered as applying only to cases, where issue is taken on the title of the person through whom the defendant claims; for no inquiry can be made into such title, where no issue has been taken upon it. *Kyd. Corp.* ii. 444; and see *Id.* 435, &c.

To obtain leave to file an information, the party applying must lay a proper case before the Court, verified by affidavit; on which the Court will grant a rule on the defendant to shew cause. It was formerly, indeed so much the practice of the Court to grant *Quo Warranto* informations, as of course, that it was held prudent never to shew cause against the rule; for fear of disclosing the grounds on which the defendant rested his defence. But since these matters have come more under consideration, it is no longer a matter of course; and the Court have, on several occasions, declared, that it was the intention of the Legislature, that they should exercise a sound discretion, according to the particular circumstances of the respective cases that came before them; and should not, without good reason, disturb the quiet of any corporation. See 1 *Term Rep.* 2: 4 *Burr.* 1964. 2022.

Where the right, or the fact on which the right depends, is disputed; that is a sufficient reason for granting an information, if the application be made within the proper time. So where the right depends on a point of new or doubtful law. See 3 *Burr.* 1485: *Cowf.* 58: *Doug.* 397. (382.)

The conduct of the parties, on whose behalf the application is made, will weigh much with the Court, in some instances, in granting or refusing an information. See 4 *Burr.* 1963. 2024. 2120: 3 *Term Rep.* 300. 573: *Cowf.* 75: 4 *Term Rep.* 223.

It is no reason for refusing an information, that informations formerly granted, for the same cause, have been abandoned; as that may have been by collusion. But it is a good reason, that the prosecutor stands exactly in the same circumstance with the defendant. 2 *Term Rep.* 770, 1. and see 1 *East's Rep.* 36.

In cases where there has been a long acquiescence, and where the objection, if it prevailed, might tend to dissolve the Corporation, the Court may refuse the application. *Cowf.* 59. But though a great number of derivative titles may be affected, by judgment of ouster against the defendant, yet, if it be confessed that elections may still be made, the Court will not refuse it on that ground alone. 2 *Term Rep.* 767. and see 3 *East's Rep.* 213.

Where the application is made in the names of persons unconnected with the Corporation, that will in general be a strong reason for refusing it. 1 *Term Rep.* 23. & 1 *East's Rep.* 46, n. But where the objection to the defendant's title is, that he had not received the sacrament within a year before his election, an information will be granted on the application of a stranger; because such an omission is against a general law, which affects all the Corporations in the kingdom. 3 *Term Rep.* 574, n.

It was formerly a subject of much discussion, whether a new trial could be granted in a *Quo Warranto* information, when the verdict was in favour of the defendant. This depended chiefly on the question, whether such an information was a criminal prosecution; but since it has been held that it is merely a civil proceeding, there is no doubt but that a new trial may be granted, where a verdict has been given in favour of the defendant, as well as where it has been given in favour of the Crown. 2 *Term Rep.* 484.

R

RAN

RACHETUM, from the Fr. *racheter*, i. e. *redimere*.] The compensation or redemption of a thief. 1 *Stat. Rob. K. Scot.* c. 9.

RACK, An engine to extort confession from delinquents, but utterly unknown to the Law of *England*. See title *Mute*.

RACK RENT, The full yearly value of the land let by lease, payable by tenant for life or years, &c. *Wood's Inst.* 185. See title *Rent*.

RACK-VINTAGE, A second Vintage; or voyage made by our merchants for racked wines, i. e. wines drawn from the lees. See *stat. antiq.* 32 *H.* 8. c. 14.

RAGEMAN, A statute attributed to the fourth year of K. *Ed. I.* is so termed; whereby Justices were assigned by the King and his Council, to hear and determine all complaints of injuries done throughout the realm, within the five years next before *Michaelmas*, in the fourth year of his reign.

RAGEMAN seems a corruption of the word *Regimen*, a Rule, Form, or Precedent. Blank Charters are termed *Raggemens*. *Rot. Parl.* 1 *Hen.* 4. nu. 69, 93.

RAGLORIA, A word mentioned in the charter of *Edw. III.* whereby he created his eldest son *Edward Prince of Wales*, in Parliament at *Westminster*, the seventeenth year of his reign, recited by *Selden* in his *Titles of Honour*, 597. ———— *Cum forestis, parcis, chascis, boscis, warrniis, hundredis, comitis, Ragloriis, ringeldiis, wodewardis, constabulariis, ballivis, &c.* *Davis* in his Dictionary says, that *rhaglaw* among the *Welsh* signifies *seneschallus, surrogatus, prepositus*.

RAGLORIUS, A steward. *Seld. Tit. of Honour*, 597.

RAGMAN'S ROLL; *Rectius*, *Ragimund's Roll*: so called from one *Ragimund*, a legate in *Scotland*, who, calling before him all the beneficial clergymen in that kingdom, caused them on oath to give in the true value of their benefices; according to which they were afterwards taxed by the Court of *Rome*; and this Roll, among other records being taken from the *Scots* by *Edward I.* was re-delivered to them in the beginning of the reign of *Edward III.*

Sir Richard Baker saith, that *Ed. III.* surrendered, by charter, all his right of sovereignty to the kingdom of *Scotland*, and restored divers instruments of their former homages and fealties, with the famous evidence called *Ragman's Roll*.

Sir David Dalrymple calls this *Ragimont's Roll*, and says the name of the legate was *Benemundus de Vica*, vulgarly called *Bagimont*. *Annals of Scotland*, anno 1275.

RAN, *Sax.*] *Aperta rapina*, open or public theft. *Lamb. Archai.* 125: *Ll. Canuti*, c. 58: *Hoveden*.

The term, all that a man can *raf* and *ran*, or still more corruptly *raf* and *rend*, is by some derived hence; *raf* from *rapio* to take by force.

RANGE, from Fr. *ranger*, to order, dispose of.] It is used in the *Forest Laws*, both as a verb, as, to range; and a substantive, as, to make range. *Charta de Foresta*, c. 6.

RANGER, A sworn officer of the Forest, of which there are twelve. *Charta de Foresta*. His Authority is in part described by his oath set by *Manwood*, *part 1. c. 50*: but more particularly *part 2. cap. 20. num. 15, 16, 17*. His office chiefly consists in three points, to walk daily through his charge, to see, hear, and inquire of trespasses in his bailiwick; to drive the beasts of the forest, both of venary and chase, out of the deafforested into the forested lands: and to present all trespasses of the forest at the next Court holden for the forest. See title *Forest*.

This Ranger is made by the King's letters patent, and hath a fee paid yearly out of the Exchequer, and certain fee deer. *Rangeator Forestæ de Whittlewood. Pat. 14 R. 2. nu. 3*.

RANSOM, Fr. *Rançon, Redemptio*.] Is properly the sum paid for redeeming a captive or prisoner of war; and sometimes taken in our Law for a sum of money paid for pardoning some great offence, and setting the offender at liberty who was under imprisonment. See *Stats. 1 H. 4. c. 7: 11 H. 6. c. 11*.

Fine and ransom go together, and some writers tell us, that they are the same; but others say, that the offender ought to be first imprisoned, and then redelivered or ransomed in consideration of a fine. *Co. Litt. 127: Dalt. 203*.

Ransom differs from amercement, being a redemption of a corporal punishment due to any crime. *Lamb. Eiren. 556*. See title *Fines for Offences*.

A ship was taken by the *French*; the master (having a share in her) ransomed her for 1800*l.* and was taken to *France* as an hostage for this money. The Ransom-money must be raised out of the profits, notwithstanding any former mortgage of the ship; for if there was a precedent mortgage, what would become of that security, if the ship had not been redeemed? After the ship was redeemed, she performed her intended voyage, and the freight-money received after redemption was the first profits arising, and out of them the Ransom money is to be satisfied; the insurers always pay a part of the ransom money. 2 *Eq. Abr. 690*. See further title *Insurance II. 2*.

RANKING OF CREDITORS: The *Scotch* Term for the arrangement of the property of a debtor according to the claims of the creditors in consequence of the nature of their respective securities. See titles *Bankrupt; Executor; Mortgage, &c.* for similar arrangements in the *English* Law.

RAPE, *Raptus vel Rapa*.] A division of a County, similar to that of a hundred; but oftentimes containing in it more hundreds than one.

Sussex is divided into six *Rapes* only, viz. *Chichester, Arundel, Bramber, Lewes, Pevensey, and Hastings*; every of which, besides hundreds, hath a castle, river, and forest belonging to it. *Camd. Britann. 225. 229*. These *Rapes* are incident to the County of *Sussex*; as *Lathes* are to *Kent*, and *Wapentakes* to *Yorkshire, &c.*

These *Rapes* and *Lathes* are considered by *Blackstone* as an intermediate division between the *Shire* and the *Hundreds*; each of them containing about three or four hundreds a piece. These had formerly their *Rape-reeves* and *Lathe-reeves*, acting in subordination to the

Shire-reeve (*Sheriff*): Where a county is divided into *three* of these intermediate jurisdictions, they are called *Trithings*, which were antiently governed by a *Trithing-reeve*. These Trithings still subsist in the large county of York, where, by an easy corruption, they are denominated *Ridings*; the North, East, and West Riding. 1 *Comm. Introduct.* § 4. p. 116. See the several titles.

RAPE OF THE FOREST, *Raptus Forestæ*.] Trespass committed in the Forest by violence; it is reckoned among those crimes whose cognizance belonged only to the King. *Leg. Hen.* 1. c. 10. See title *Forest*.

RAPE OF WOMEN, *Raptus*, from *rapio*.] An unlawful and carnal knowledge of a woman, by force, and against her will: a ravishment of the body, and violent deflowering her; which is Felony by the Common and Statute Law. *Co. Litt.* 190. The word *Rapuit* (ravished) is so appropriated by Law to this offence, that it cannot be expressed by any other; even the words *Carnaliter Cognovit*, &c. without it, will not be sufficient. *Co. Litt.* 124. 2 *Inst.* 180.

Rape was punished by the *Saxon* laws, particularly those of King *Athelstan*, with death, *Bracton*, l. 3. c. 28. But this was afterwards thought too hard; and in its stead another severe, but not capital punishment, was inflicted by *William the Conqueror*, viz. castration and loss of eyes; which continued till after *Bracton* wrote, in the reign of *Henry the Third*. *Lt. Guil. Cong.* c. 19.

But, in order to prevent malicious accusations, it was then the Law, (and, it seems, still continues to be so in appeals of Rape,) that the woman should immediately after "*dum recens fuerit maleficium*," go to the next town, and there make discovery to some credible persons of the injury she has suffered: and afterwards should acquaint the High Constable of the hundred, the Coroners, and the Sheriff with the outrage. *Glanv.* l. 14. c. 6: *Bract.* l. 3. c. 28. See 1 *Hale P. C.* 632. Afterwards, by statute *Westm.* c. 13. the time of limitation was extended to forty days. At present there is no time of limitation fixed; for as it is usually now punished by indictment at the suit of the King, the maxim of Law takes place, that *nullum tempus occurrit Regi*; but the Jury will rarely give credit to a stale complaint. During the former period also it was held for Law, that the woman (by consent of the Judge and her parents) might redeem the offender from the execution of his sentence, by accepting him for her husband; if he also was willing to agree to the Exchange, not otherwise. *Glanv.* l. 14. c. 6: *Bract.* l. 3. c. 28.—But this is now not held for Law; and it is said, that the election of the woman is taken away by virtue of *stat. Westm.* 2. making the Rape felony, *although she consent afterwards*. See *post*.

By *stat. Westm.* 1. 3 *Ed.* 1. c. 13. the punishment of Rape was much mitigated: the offence itself, of ravishing a damsel within age, (that is, under twelve years old,) either with her consent or without, or of any other woman against her will, being reduced to a trespass, *if not prosecuted by appeal within forty days*, and subjecting the offender only to two years imprisonment, and a fine at the King's will. But, this lenity being productive of the most terrible consequences, it was soon found necessary to make the offence of forcible Rape felony, which was accordingly done by *stat. Westm.* 2. 13 *Ed.* 3. c. 34. And by *stat.* 18 *Eliz.* c. 7. it is made Felony without benefit of Clergy: as is also the abominable wickedness of carnally knowing and abusing

any woman child under the age of ten years; in which case the consent or non-consent is immaterial, as by reason of her tender years she is incapable of judgment and discretion.

Before this statute it was a question, whether a Rape could be committed on the body of a child of the age of six or seven years; and a person being indicted for the Rape of a girl of seven years old, although he was found guilty, the Court doubted, whether a child of that age could be ravished; and it was said, if she had been nine years old she might, for at that age she may be endowed. *Dyer* 304.

Hale is indeed of opinion, that such profligate actions committed on an infant under the age of twelve years, the age of female discretion by the Common Law, either with or without consent, amount to Rape and Felony; as well since as before the statute of Queen *Elizabeth*, 1 *Hal. P. C.* 631.

That Law, however, has in general been held only to extend to infants under ten; though it should seem that damsels between ten and twelve are still under the protection of the *stat. Westm.* 1. the Law with respect to their seduction not having been altered by either of the subsequent statutes. 4 *Comm. c.* 15.

A male infant, under the age of fourteen years, is presumed by Law incapable to commit a Rape, and therefore, it seems, cannot be found guilty of it. For though in other felonies *malitia supplet aetatem*, yet, as to this particular species of felony, the Law supposes an imbecility of body as well as mind. 1 *Hal. P. C.* 631.

It is no excuse or mitigation of the crime, that the woman *at last* yielded to the violence, and consented either after the fact or before, if such consent was forced by fear of death or duress; or that she was a common strumpet, for she is still under the protection of the Law, and may be forced: but it was antiently held to be no Rape to force a man's own concubine; and it is said by some to be evidence of a woman's consent, that she was a common whore. 1 *Harvk. P. C. c.* 41. § 2: *Co. Litt.* 123: See 1 *Hal. P. C.* 629.

Also, formerly, it was adjudged not to be a Rape to force a woman, who conceived at the time; because it was imagined, that if she had not consented, she could not have conceived: though this opinion hath been since questioned, by reason the previous violence is no way extenuated by such a subsequent consent: and if it were necessary to shew the woman did not conceive, to make the crime, the offender could not be tried till such time as it might appear whether she did or not. 2 *Inst.* 190: 1 *Harvk. P. C. c.* 41. § 2.

As to the material facts requisite to be given in evidence and proved upon an indictment of Rape, they are of such a nature, that though necessary to be known and settled, for the conviction of the guilty and preservation of the innocent, and therefore are to be found in such criminal treatises as discourse of these matters in detail, yet they are highly improper to be publicly discussed, except only in a Court of Justice. The following remarks, with regard to the competency and credibility of the witnesses, may, *salvo pudore*, be considered.

And, first, the party ravished may give evidence upon oath, and is, in Law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the Jury upon the circumstances of fact that concur in that testimony. For instance, if the witness be of good fame; if she presently discovered the offence, and made search for the offender; if the party accused fled for it; these

and the like are concurring circumstances, which give greater probability to her evidence. But, on the other side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place where the fact was alleged to be committed, was where it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong, but not conclusive, presumption that her testimony is false or feigned. 1 *Hale, P. C.* 634, 5, 6.

Moreover, if the Rape be charged to be committed on an infant under twelve years of age, she may still be a competent witness, if she hath sense and understanding to know the nature and obligations of an oath; or even to be sensible of the wickedness of telling a deliberate lie. Nay, though she hath not, it is thought by Sir *Matthew Hale*, that she ought to be heard without oath, to give the Court information; and others have held, that what the child told her mother, or other relations, may be given in evidence; since the nature of the case admits frequently of no better proof. But, it is now settled, by a solemn determination of the twelve Judges, that no hearsay evidence can be given of the declarations of a child who hath not capacity to be sworn, nor can such child be examined in Court without oath: and that there is no determinate age, at which the oath of a child ought either to be admitted or rejected. Yet, where the evidence of children is admitted, it is much to be wished, in order to render their evidence credible, that there should be some concurrent testimony, of time, place, and circumstances, in order to make out the fact; and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion. There may be therefore, in many cases of this nature, witnesses who are competent, that is, who may be admitted to be heard; and yet, after being heard, may prove not to be credible, or such as the Jury is bound to believe. 4 *Comm. c.* 15.

Aiders and abettors in committing a Rape, may be indicted as principal felons, whether men or women. 1 *Hawk. P. C. c.* 41. § 6. Lord *Audley* was indicted and executed as a principal, for assisting his servant to ravish his own wife, who was admitted a witness against him. *Dalt.* 107: 1 *St. Trials* 265.

Hale observes, that though a Rape is a most detestable crime, it is an accusation easily made, and hard to be proved, but harder to be defended by the man accused, although ever so innocent: and he mentions several instances of Rapes, which at the time were apparently fully proved, but were afterwards discovered to have been malicious contrivances. 1 *Hale's Hist. P. C.* 635, 636. See further, title *Appeal of Rape*.

RAPINE, *Rapina*.] To take a thing in private, against the owner's will, is properly theft; but to take it openly, or by violence, is Rapine. See title *Robbery*: And as to *Rapine on the Northern borders*, see titles *Mischief*; *Malicious*; *Northumberland*.

RAPTU HEREDIS, A Writ for taking away an Heir holding in socage; of which there are two sorts, one when the Heir is married, the other when he is not; see *Reg. Orig.* 163; and this Dict. title *Guardian*.

RASE, *Raseria*.] Seems to have been a measure of corn now disused. Toll shall be taken by the *Rase*, and not by the heap or cantel. *Ordinance for Bakers, &c. c.* 4.

RASURE of a Deed, so as to alter it in a material part, without

consent of the party bound by it, &c. will make the same void; and if it be rased in the date, after delivery, it is said it goes through the whole. *5 Rep.* 23. 119.

Rasure, &c. is most suspicious, when it is in a Deed-poll, that there is but one part of the Deed, and it makes to the advantage of him to whom made. And where a Deed, by Rasure, addition, or alteration, becomes no Deed, the defendant may plead *non est factum*. *5 Rep.* 23. 119. See titles *Deed*; *Pleading*.

RATE, A valuation of every man's estate; or the appointing and setting down how much every one shall pay, or be charged with, to any tax.

RATE-TITHE, Is when any sheep or other cattle are kept in a parish for less time than a year, the owner must pay Tithe for them *pro Rata*, according to the custom of the place. *F. N. B.* 51. See title *Tithes*.

RATIFICATION, *Ratificatio*.] A ratifying or confirming: it is particularly used for the confirmation of a Clerk in a prebend, &c. formerly conferred on him by the Bishop, where the right of patronage is doubted, or supposed to be in the King. *Reg. Orig.* 304.

RATIHABITIO, Confirmation, agreement, consent. See *18 Vin. Abr.* 156.

RATIO, An account; as *reddere rationem*, to give an account, and so it is frequently used. According to some it is a cause, or giving judgment therein; and *ponere ad rationem*, is to cite one to appear in judgment. *Wals.* 88.

RATIONABILIBUS DIVISIS, A Writ which lies where two lords, in divers towns, have seigniories joining together, for him who findeth his waste by little and little to have been encroached on, against the other who hath encroached, thereby to rectify their bounds; in which respect *Fitzherbert* calls it in its own nature a writ of Right. The *Old Nat. Brev.* says, that this is a kind of *Justicies*, and may be removed by a *pone* out of the county to the Common Bench. See the form and use in *F. N. B.* 128: and *Reg. Orig.* 157: and this Dictionary, title *Perambulation*.

RATIONABILE ESTOVERIUM, Alimony was heretofore so called. See *Magna Carta*, and this Dict. title *Baron and Feme* XI.

RATIONABILI PARTE, A Writ of Right for Lands, &c. See *Right*, *Writ of*; *Recto de Rationabili Parte*.

RATIONABILI PARTE BONORUM, A Writ which lay for a wife, after the death of her husband, against the executors of the husband, denying her the third part of his goods after debts and funeral charges paid. *F. N. B.* 222.

It appears by *Glanville*, that by the Common Law of *England*, the goods of the deceased (his debts first paid) shall be divided into three parts; one for the wife, another for his children, and the third to the executors: and this writ may be brought by the children, as well as the wife. *Reg. Orig.* 142.

But it seems to be used only where the custom of the county serves for it; and the writs in the register rehearse the customs of the counties, &c. *New Nat. Br.* 270, 271.

As to children bringing this writ, their marriage is no advancement, if the father's goods be not given in his lifetime; but where a child is advanced by the father, this writ will not lie. *New Nat. Br.* 270. See this Dict. titles *Executor* V. 8; *Will*: and *18 Vin. Abr.* 158.

RAVISHMENT, Fr. *Ravissement*, i. e. *Direptio, raptio*.] An unlawful taking away either a woman, or an heir in ward; sometimes it is used in the same sense with Rape.

RAVISHMENT DE GARD, *Ravishment of Ward*.] A Writ which lay for the guardian by knights-service, or in socage, against a person who took from him the body of his Ward. *F. N. B.* 140.

By *stat. 12 Car. 2. c. 24.* this writ is taken away, as to lands, held by knights-service, &c. but not where there is a guardian in socage, or appointed by will. See title *Guardian*.

The Mayor and Aldermen and Chamberlain of *London*, who have the custody of orphans, if they commit any orphan to another, he shall have a writ of Ravishment of Ward against him who taketh the Ward out of his possession. *New Nat. Brev.* 317. See titles *London*; *Orphans*.

RAY, Cloth never coloured or dyed. See *stats. 17 R. 2. c. 3: 11 H. 4. c. 6: 1 R. 3. c. 8.*

REAFFORESTED, Is where a forest which had been deafforested is again made forest; as the forest of *Dean* is by *stat. 20 Car. 2. c. 3.*

REAL ACTION. See title *Action*.

REAL RIGHT. The right of property, *jus in re*; the person having which right may sue for the subject itself. A personal right, *jus ad rem*, entitles the party only to an action for performance of the obligation.

REAL WARRANTICE, is when infeoffment of one tenement is given in security of another. *Scotch Dict.*

REALTY, Is an abstract of real, as distinguished from Personalty.

REASON, Is the very life of Law; and what is contrary to it is unlawful.

When the Reason of the Law once ceases, the Law itself generally ceases; because Reason is the foundation of all our Laws. *Co. Litt.* 97. 183.

If maxims of Law admit of any difference, those are to be preferred which carry with them the more perfect and excellent Reason. *Ibid.* See 1 *Comm.* 70.

REASONABLE AID, A duty claimed by the lord of the fee, of his tenants holding by knights-service, to marry his daughter, &c. *Stat. Westm. 2. c. 24.* See title *Tenures*.

REASONABLE CAUSE. See *Consideration*.

REASONABLE PART; See *Rationabili Parte*.

REATTACHMENT, *Reattachiamentum*.] A second Attachment of him who was formerly attached and dismissed the Court without day, by the not coming of the Justices, or some such casualty. *Broke Reg. Orig.* 35.

A cause discontinued, or put without day, cannot be revived without Reattachment or Resummons; which, if they are special, may revive the whole proceedings; but, if general, the original record only. 2 *Hawk. P. C. c. 27. § 105.* And on a Reattachment, the defendant is to plead *de novo*, &c. See *Day*.

REBATE; Discount; The abating what the interest of money comes to, in consideration of prompt payment. *Merch. Dict.* See title *Usury*.

REBELLION, *Rebellio*.] Among the *Romans*, was where those who had been formerly overcome in battle, and yielded to their sub-

jection, made a second resistance: but with us it is generally used for the taking up of arms traiterously against the King, whether by natural Subjects, or others when once subdued; and the word Rebel is sometimes applied to him who wilfully breaks a Law: so to a villein disobeying his lord. See *stats. 25 Ed. 3. c. 6: 1 R. 2. c. 6.*

There is a difference between Enemies and Rebels: Enemies are those who are out of the King's allegiance; therefore Subjects of the King, either in open War, or Rebellion, are not the King's Enemies, but Traitors. Thus *David*, Prince of *Wales*, who levied war against *Edw. I.* because he was within the allegiance of the King, had sentence pronounced against him as a Traitor and Rebel. *Fleta, lib. 1. c. 16.* Private persons may arm themselves to suppress Rebels, Enemies, &c. *1 Hawk. P. C. c. 63. § 10.*

Rebellion is also used for disobedience to the process of Courts of Law, in *Scotland* or *Ireland*.

REBELLIOUS ASSEMBLY; See title *Riot*.

REBUTTER, from the Fr. *bouter*, i. e. *repellere*, to put back or bar.] The answer of a defendant to a plaintiff's surrejoinder. See title *Pleading*.

Rebutter is also where a man by deed or fine grants to warranty any land or hereditament to another; and the person making the warranty, or his heir, sues him to whom the warranty is made, or his heir or assignee, for the same thing; if he who is so sued, plead the deed or fine with warranty, and pray judgment if the plaintiff shall be received to demand the thing which he ought to warrant to the party, against the warranty in the deed, &c. this is called a Rebutter. *Terms de Ley.* And if I grant to a tenant to hold without impeachment of waste, and afterwards implead him for waste done, he may debar me of this action, by shewing my grant; which is Rebutter. *Co. Entr. 284: Co. Litt. 365.*

RECAPTION, *Recaptio*.] The taking a second distress of one formerly distrained, during the plea grounded on the former distress: and it is a writ to recover damages for him whose goods being distrained for rent, or service, &c. are distrained again for the same cause, pending the plea in the County-court, or before the Justices. *F. N. B. 71, 72. See stat. antiq. 47 Ed. 3. c. 7.*

A Recaption lies where the lord distrains other cattle of the tenant than he first distrained, as well as if he had distrained the same cattle again, if it be for one and the same cause; but *anno 19 Ed. III.* issue was taken whether the cattle were other cattle of the plaintiff, &c. *New Nat. Br. 161.* See title *Replevin*.

If the lord distrain the cattle of a stranger for the same rent, and not his cattle who was first distrained; neither the stranger, nor the party first distrained, shall have the writ of Recaption: And if the lord distrain for rent or service, and afterwards the lord's bailiff takes a distress on the same tenant for the same rent or service, pending the plea: the tenant shall not have a Recaption against the lord, nor against the bailiff, although the bailiff maketh cognizance in right of the lord, &c. for it may be the lord had no notice of that distress, or the bailiff had no notice of the distress taken by the lord; though in such case action of trespass lies; and if the lord agree to the distress taken by his servant or bailiff, the tenant may have this writ against the lord. *New Nat. Br. 159.*

A man is distrained within a liberty, and sues a replevin there by

plaint or writ, and pending that plaint in the liberty he is distrained again for the same cause by the person who distrained before; he shall not on that distress bring a writ of Recaption, because the plaint is not pendent in the County-court before the Sheriff, nor in *C. B.* before the Justices: but if the plaint be removed by *fiore* or *recordare* out of the liberty before the Justices, then the party distrained may have a Recaption, &c. And if a person be convicted before the Sheriff in a writ of Recaption, he shall not only render damages to the party, but be amerced for the contempt; and be fined. 39 *Ed.* 3. See further title *Replevin*.

For damage-feasant, beasts may be distrained as often as they be found on the land; because every time is for a new trespass and a new wrong, and no Recaption lies.

RECAPTION is also a species of remedy by the mere act of the party injured. This happens, when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant; in which case the owner of the goods, and the husband, parent, or master may lawfully claim and retake them, wherever he happens to find them; so it be not in a riotous manner, or attended with a breach of the peace. 3 *Inst.* 134: *Hal. Annal.* s. 46.

The reason for this is obvious; since it may frequently happen that the owner may have this *only* opportunity of doing himself justice: his goods may be afterwards conveyed away or destroyed; and his wife, children, or servants, concealed or carried out of his reach, if he had no speedier remedy than the ordinary process of Law. If therefore he can so contrive it as to gain possession of his property again, without force or terror, the Law favours, and will justify, his proceeding. But, as the public peace is a superior consideration to any one man's private property; and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided, that this natural right of Recaption shall never be exerted, where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair or public inn, I may lawfully seize him to my own use: but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen; but must have recourse to an action at law. 2 *Roll. Rep.* 55, 56, 208: 2 *Roll. Abr.* 565, 566: 3 *Comm.* 4. As to the recovery of stolen goods on convictions, see title *Restitution*.

RECEIPT; See *Resceit*.

All Receipts in writing are subjected to certain stamp-duties, from 2d. to 2s. by various acts of Parliament.

RECEIVER, *Receptor.*] Is by us, as with the *Civilians*, commonly used in the evil part, for such as receive stolen goods, &c. The receiving a felon and concealing him and his offence, makes a person accessory to the felony. 2 *Inst.* 183. See title *Accessory* II. 3.

By the Common Law, THE RECEIVING OF STOLEN GOODS was a misdemeanor: but by *stat.* 3 & 4 *W. & M. c.* 9. it is enacted, "that Receivers of stolen goods knowing them to be stolen, shall be deemed accessories after the fact."

But this offence being dependent on the fate of the principal, a Receiver thus circumstanced could not be tried till after the conviction

of such principal; so that however strong and conclusive the evidence might be, the Receiver was still safe, unless the thief could be apprehended: and even if apprehended, and put upon his trial, if acquitted through any defect of evidence, the Receiver, although he had actually confessed the crime, and the goods in his possession could be proved to be stolen, must be acquitted also; and this offence, even if completely proved, applied only to capital felonies, and *not to petit larceny*.

These defects were afterwards foreseen, and partly remedied by *stats. 1 Ann. st. 2. c. 9: 5 Ann. c. 31*; which enact, "that Buyers and Receivers of stolen goods, knowing them to be stolen, may be prosecuted for a misdemeanor, and punished by fine and imprisonment: though the principal be not previously convicted of felony: or though he cannot be taken so as to be prosecuted and convicted."

This act also greatly improved the laws applicable to this species of offence; by empowering the Court to substitute a corporal punishment instead of fine and imprisonment; and by declaring, that if the felony shall be proved against the thief, then the accessory should receive judgment of death; but the benefit of clergy was reserved.

The mischief still increasing, and these laws being found insufficient, the *stat. 4 Geo. 1. c. 11.* enacted, "that Receivers of stolen goods, knowing them to be stolen, should, on conviction, be transported for fourteen years; and that buying at an undervalue should be presumptive evidence of such knowledge." And the same statute makes it felony, without benefit of clergy, "for any person, directly, or indirectly, to take a reward for helping any person to stolen goods; unless such person bring the felon to his trial, and give evidence against him." See title *Advertisement*.

But still these amendments proved ineffectual; and not being found to apply immediately to persons receiving stolen *lead, iron, copper, brass, bell-metal, or solder*, taken from buildings, or from ships, vessels, wharfs, or quays: It was enacted by *stat. 29 Geo. 2. c. 30.* "that the Receivers of such articles, knowing the same to be stolen, or who shall privately purchase these respective metals, by suffering any door, window, or shutter to be left open between *sun-setting* and *sun-rising*, or shall buy or receive any of the said metals in a clandestine manner, shall, on conviction, be transported for fourteen years; although the principal felon has not been apprehended or punished." § 1.

The same statute empowers one Justice to grant a warrant to search in the day-time for such metals suspected to be stolen, as by the oath of one witness may appear to be deposited or concealed in any house or place; and if goods are found, the statute empowers two Justices to adjudge the person having the custody of the same guilty of a misdemeanor, if he does not produce the party from whom he purchased, or give a satisfactory account how they came into his possession; and the *offender shall forfeit 40s. for the first offence: 4l. for the second: and 6l. for every subsequent offence.* §§ 2. 6.

This statute also empowers officers of justice (and watchmen while on duty) to apprehend all persons suspected of conveying any stolen metals, as already described, after sun-set or before sun-rise; and if such persons cannot give a good account of the manner by which they were obtained, two Magistrates are in like manner authorised to adjudge them guilty of a misdemeanor, and they to forfeit 40s. &c. § 3. 6.

The persons also to whom such articles are offered for sale, or to be pawned, where there is reasonable ground to suppose they were stolen, are empowered to apprehend and secure the parties, and the materials, to be dealt with according to Law. And if it shall appear, even on the evidence of the thief, corroborated by other testimony, that there was cause to suspect the goods were stolen, and that the person, to whom they were offered, did not do his duty in apprehending the person offering the same, he shall be adjudged guilty of a misdemeanor, and forfeit 20*s.* for the first offence: 40*s.* for the second: and 4*l.* for every offence subsequent. § 5. And so anxious has the Legislature been to suppress the evil of stealing and receiving metals, that § 8. of the said *stat.* 29 *Geo.* 2. *c.* 30. entitles the actual thief to a pardon, on the discovery and conviction of two or more of the Receivers: And § 9. screens from prosecution any person stealing such metals, who shall discover the Receiver to whom the same were delivered, so as a conviction might follow.

Under these *stats.* 3 & 4 *W. & M.* *c.* 9: 5 *Ann.* *c.* 31: 29 *Geo.* 2. *c.* 30. the prosecutor has two methods in his choice; either to punish the Receivers for the misdemeanor, immediately, before the thief is taken: or to wait till the felon is convicted, and then punish them as accessories to the felony. But it is provided by the statutes, that he shall only make use of one, and not both, of these methods of punishment. *Foster* 374.

By *stat.* 30 *Geo.* 2. *c.* 24. It shall be lawful for any pawn-broker, or any other dealer, their servants, or agents, to whom any goods shall be offered to be pawned, exchanged, or sold, which shall be suspected to be stolen, to seize and detain the persons offering the same, for the purpose of being examined by a justice; who is empowered, if he sees any grounds to apprehend that the goods have been illegally obtained, to commit the persons offering the same, to prison, for a period not exceeding six days; and if on the further examination, the Justice shall be satisfied that the goods were stolen, he shall commit the offender to prison, to be dealt with according to Law; and although it may afterwards appear that the goods in question were fairly obtained, yet the parties who seized the supposed offender shall be indemnified.

It has been determined, that money and bank-notes are not goods within the meaning of these statutes. *Leach* 208. 368. Upon the trial of the Receiver, the principal felon may be admitted a witness. *Leach* 325.

It is well observed by the ingenious author of the *Treatise on the Police of the Metropolis*, that it would have been useful if the principles of the first of these statutes had extended to every kind of goods and chattels, *horses, cattle, money, and bank notes*, as well as to the metals therein described: but it is to be lamented, that the system has not been to look at great features of abuse in the gross, so as to meet every existing pressure at once; and therefore another partial statute was made, 2 *Geo.* 5. *c.* 28. extending the provisions of *stat.* 29 *Geo.* 2. *c.* 30. to goods, stores, or materials taken from ships in the river *Thames*; by enacting, "that all persons purchasing such goods, knowing them to be stolen, or receiving the same in a concealed or clandestine manner, between sun-setting and sun-rising, shall be transported for fourteen years, although the principal felon be not con-

victed:" but, by the wording of this act, it is doubtful if it applies to receiving stolen goods from vessels not afloat in the River.

The next statute applicable to the Receivers of stolen goods, is *stat. 10 Geo. 3. c. 48*; whereby it is enacted, "that the Buyers and Receivers of jewels, gold, silver, plate, or watches, knowing the same to be stolen, where such stealing was accompanied by a burglary or highway robbery, may be tried, as well before as after the principal felon is convicted; and whether he be in or out of custody; and if found guilty shall be transported for fourteen years."

Eleven years after the passing of the above mentioned statute, the Legislature appearing to be impressed with the great extent of the depredations committed by persons stealing *pewter pots*, and desirous of punishing the Receivers, the *stat. 21 Geo. 3. c. 69.* was passed; which enacts, "that any person who shall buy or receive any pewter pot or other vessel, or any pewter in any form or shape whatsoever, knowing the same to be stolen, or who shall privately buy or receive stolen pewter in a clandestine manner, between sun-setting and sun-rising, shall, on conviction, be transported for seven years, or detained in the House of Correction, at hard labour for a term not exceeding three years, nor less than one year, and may be whipped not more than three times; although the principal felon has not been convicted."

In the following Session of Parliament, the *stat. 22 Geo. 3. c. 58.* removed many of the imperfections of former statutes, and particularly that which respected Petty Larceny; by enacting, "That where any goods (*except lead, iron, copper, brass, bell-metal, or solder, the Receivers of which, it has been already stated, are punishable, under stat. 29 Geo. 2. c. 30. by transportation for fourteen years,*) have been stolen, whether the offence amount to Grand Larceny, or some greater offence, or to Petty Larceny only; (*except where the offender has been convicted of Grand Larceny, or some greater offence; when the Receiver must be prosecuted as an accessory to the felony; and under stat. 14 Geo. 1. c. 11. already noticed, may be transported for fourteen years;*) every person who shall buy or receive the same, knowing them to be stolen, shall be guilty of a misdemeanor, and punished by fine, imprisonment, or whipping, as the Quarter Sessions who are empowered to try such offender, or any other Court, before whom he shall be tried, shall think fit, although the principal be not convicted; and if the felony amounts to Grand Larceny, or some greater offence, and the person committing such felony has not been before convicted, such offender shall be exempted from being punished as accessory, if the principal shall be afterwards convicted." § 1.

This statute also empowers one Justice to grant a warrant to search for stolen goods in the day-time, an oath being made, that there are just grounds of suspicion; and the person concealing the said goods, or in whose custody they are found, shall, in like manner, be guilty of a misdemeanor, and punished in the manner before mentioned. § 2.

The same statute extended the powers granted by former acts relative to metals, to any other kind of goods, by authorising peace officers (and also watchmen while on duty) to apprehend all persons suspected of carrying stolen goods after sun-setting and before sun-rising, who shall, on conviction, be adjudged guilty of a misdemeanor, and imprisoned, not exceeding six, nor less than three months. § 3.

Power is also given by this act to any person to whom goods sus-

pected to be stolen, shall be offered to be sold or pawned, to apprehend the person offering the same, and to carry him before a Justice.

And as an encouragement to young thieves to discover the Receivers, the same act provides, "That if any person or persons being out of custody, or in custody, if under the age of fifteen years, upon any charge of felony within benefit of clergy, shall have committed any felony, and shall discover two Receivers, so as that they shall be convicted, such discoverer shall have pardon for all felonies by him committed before such discovery."

When the *stat. 3 & 4 W. & M. c. 9.* had made the Receiver of stolen goods an accessory after the fact, his punishment in the case of Grand Larceny was the same as that of the principal, *viz.* burning in the hand, and imprisonment not exceeding a year. By *stat. 4 Geo. 1. c. 11.* the punishment of the principal might be changed, at the discretion of the Court, into transportation for *seven* years; but it seems to be understood, that the clause respecting the Receiver is peremptory, and that the Court is obliged to sentence him to transportation for *fourteen* years. *Fost. 73.* The words of the statute, however, it has been remarked, are, *that it shall and may be lawful* for the Court to order Receivers to be transported for fourteen years; which seem to leave it still to the discretion of the Judge, whether he will inflict this, or the former punishment of burning in the hand, upon the offender. *4 Comm. c. 10. in n.*

By a local act, *46 Geo. 3. c. xxxv. § 32.* for improving the harbour of Bristol, persons purchasing articles stolen from any ship in the rivers *Severn* or *Frome*, knowing the same to be stolen, are punishable by fourteen years transportation; although the principal offender is not convicted nor amenable to justice.

RECEIVER. Annexed to other words, as Receiver of rents, signifies an officer belonging to the King, or other personage. *Cromp. Jurisd. 18. See Accounts.*

RECEIVER OF THE FINES; An officer who receives the money of all such as compound with the King, on original writs sued out of Chancery. *West. Symb. par. 2. sect. 106: Stat. 1 Ed. 4. c. 1.*

RECEIVER-GENERAL OF THE DUCHY OF LANCASTER; An Officer of the Duchy Court, who collects all the revenues, fines, forfeitures, and assessments within the Duchy, or what is there to be received, arising from the profits of the Duchy Lands, &c. *Stat. 39 E. c. 7.*

RECEIVER OF THE KING'S RENTS AND TENTHS; What he shall take for acquittances, see *stat. 33 H. 8. c. 39. § 65.* See title *King VI.*

RECITAL, *Recitatio.*] Is the rehearsal or making mention, in a deed or writing, of something which has been done before. *1 Lill. Abr. 416.*

A Recital is not conclusive, because it is no direct affirmation; otherwise, by feigned Recitals in a true deed, men might make what titles they pleased, since false Recitals are not punishable. *Co. Litt. 532: 2 Lev. 108.*

If a person by deed of assignment recite that he is possessed of an interest in certain lands, and assign it over by the deed, and become bound by bond to perform all the agreements in the deed; if he is not possessed of such interest, the condition is broken; and though a recital of itself is nothing, yet, being joined and considered with the rest of the deed, it is material. *1 Leon. 112.* A Recital, that before

the indenture the parties were agreed to do such a thing, is a covenant; and the deed itself confirms it. 3 *Keb.* 466.

The Recital of one lease in another, is not a sufficient proof that there was such a lease as is recited. *Vaugh.* 74. But the Recital of a lease in a deed of release, is good evidence of a lease against the lessor, and those who claim under him. *Mod. Ca.* 44.

A new reversionary lease shall commence from the delivery, where an old lease is recited, and there is none, &c. *Dyer* 93: 6 *Rep.* 36.

A. recites that he hath nothing in such lands, and in truth he hath an estate there, and makes a lease to *B.* for years: the Recital is void, and the lease good. *Jenk. Cent.* 255. In this case, if the Recital were true, the lease would not bind. See title *Deeds*.

RECLAIMING BILL, In *Scotch* Law, a petition of Appeal against the judgment of any Lord Ordinary, or the Court of Session.

RECOGNITION, *Recognitio*.] An acknowledgment: it is the title of the first chapter of the *stat.* 1 *Jac.* 1. whereby the Parliament acknowledged the Crown of *England*, on the death of *Queen Elizabeth*, rightfully to have descended to King *James*.

RECOGNITIONE ADNULLANDA *per Vim et Duritiem facta*, A Writ to the Justice of *C. B.* for sending a record touching a Recognizance, which the Recognizor suggests was acknowledged *by force and duress*; that if it so appear, the Recognizance may be disannulled. *Reg. Orig.* 183.

RECOGNITORS, *Recognitores*.] The Jury impanelled on an Assize; so called, because they acknowledge a disseisin by their verdict. *Bract. lib.* 5. See titles *Assize*; *Jury*.

RECOGNIZANCE, *Fr. Reconnaissance*; *Lat. Recognitio; Obligatio*.] An obligation of Record, which a man enters into, before some Court of Record, or Magistrate duly authorised, with condition to do some particular act; as to appear at the Assizes, to keep the peace, to pay a debt, or the like. It is, in most respects, like another bond; the difference being chiefly this; that the bond is the creation of a fresh debt, or obligation *de novo*; the Recognizance is an acknowledgment of a former debt upon record: the form whereof is, "That *A. B.* doth acknowledge to owe to our Lord the King, to the plaintiff, to *C. D.* or the like, the sum of 10*l.*" with condition to be void on performance of the thing stipulated; in which case the King, the plaintiff, *C. D.* &c. is called the Cognizee, *is cui cognoscitur*; as he that enters into the Recognizance is called the Cognizor, *is qui cognoscit*. This being either certified to, or taken by, the officer of some Court, is witnessed only by the record of that Court, and not by the party's seal: so that it is not, in strict propriety, a deed, though the effects of it are greater than a common Obligation, being allowed a priority in point of payment, and binding the lands of the Cognizor from the time of enrolment on record. *Stat.* 29 *Car.* 2. *c.* 3. See *post*.

As to Recognizances of a private kind, in nature of a *Statute Staple*, by virtue of *stat.* 23 *H.* 8. *c.* 6. and which are a charge on real estate, the following observations will serve at present: and see further, title *Statute-Staple*.

For debt, or bail, they are taken or acknowledged before the Judges, a Master in Chancery, &c. See title *Bail*. And to appear at the Assizes or Sessions, they may be taken by Justices of Peace; which recognizances are to be returned by the Justices to the Sessions, or an information lies against them. 2 *Lil. Abr.* 417. See *Justices*.

By the statute, 23 *H. 8. c. 6.* the Chief Justices of the King's Bench and Common Pleas in term time, or in their absence out of term, the Mayor of the Staple at *Westminster*, and the Recorder of *London*, jointly, have power to take Recognizances for the payment of debts in this form, *Noverint universi per præsentes Nos A. B. & C. D. teneri & firmiter obligari E. F. in centum libris, &c.* They are to be sealed with the seal of the Cognizor, and of the King appointed for that purpose, and the seal of one of the Chief Justices, &c. And the Recognizees, their executors and administrators, have the like process and execution against the Recognizors, as on Obligations of Statute-Staple. 2 *Inst.* 678. See title *Statute-Staple*.

The execution on a Recognizance or statute, pursuant to *stat. 23 H. 8. c. 6.* is called an extent; and the body of the Cognizor, (if a layman,) and all his lands, &c. into whose hands soever they come, are liable to the extent; goods (not of other persons in his possession) and chattels, as leases for years, cattle, &c. which are in his own hands, and not sold *bonâ fide*, and for valuable consideration, are also subject to the extent. 3 *Rep.* 13.

But the land is not the debtor, but the body; and land is liable only in respect that it was in the hands of the Cognizor at the time of the acknowledgment of the Recognizance, or after; and the person is charged, but the lands chargeable only. *Plowd.* 72.

Lands held in tail are chargeable only during life, and do not affect the issue in tail; unless a recovery be passed, when it is as fee-simple land: Copyhold lands are subject to the extent, only during the life of the Cognizor. The lands a man hath in right of his wife, shall be chargeable, only during the lives of husband and wife together; and lands which the Cognizor hath in joint-tenancy with another, are liable to execution during the life of the Cognizor, and no longer; for after his death, if no execution was sued in his life, the surviving joint-tenant shall have all; but if the Cognizor survive, all is liable. 2 *Inst.* 673.

If two or more join in the recognizance, &c. the lands of all ought equally to be charged: and where a Cognizor, after he hath entered into a Recognizance or statute, conveys his lands to divers persons, and the Cognizee sues execution on the lands of some of them, and not all; in this case he or they, whose lands are taken in execution, may, by *audita querelâ* or *scire facias*, have contribution from the rest, and have all the lands equally and proportionably extended. But the Cognizor or his heirs, when he sells part of his lands and keeps the remainder, shall not have any contribution from a purchaser, if his land is put in execution. 3 *Rep.* 14: *Plowd.* 72.

If there be a Recognizance, and after a statute entered into by one man to two others; his lands may be extended *pro rata*, and so taken in execution. *Yelv.* 12.

This kind of Recognizance may be used for payment of debts; or to strengthen other assurance. *Wood* 288. If a Recognizance is to pay 100*l.* at five several days, *viz.* 20*l.* on each day, immediately after the first failure of payment, the cognizee may have execution by *elegit* on the Recognizance for the 20*l.* and shall not stay till the last day of payment is past, for this is in nature of several judgments. *Co. Litt.* 292: 2 *Inst.* 395. 471. When no time is limited in a statute or Recognizance for payment of the money, it is due presently. See title *Bond*.

A Recognizance for money lent, though it is not a perfect record till entered on the roll: yet, when entered, it is a Recognizance from the first acknowledgment, and binds persons and lands from that time. *Hob.* 196. By *stat.* 29 *Car.* 2. c. 3. no Recognizance shall bind lands in the hands of purchasers for valuable consideration, but from the time of enrolment; which is to be set down in the margin of the roll: and Recognizances, &c. in the counties of *York* and *Middlesex*, shall not bind lands, unless registered, pursuant to *stats.* 2 *Ann.* c. 4: 5 *Ann.* c. 18: 6 *Ann.* c. 35: 7 *Ann.* c. 20. See tit. *Registry of Deeds*. The Clerk of the Recognizances is to keep three several rolls of the entering Recognizances taken by the Chief Justices, &c. and the persons before whom the Recognizances are taken; and the parties acknowledging, are to sign their names to the roll, as well as to the Recognizance. *Stat.* 8 *Geo.* 1. c. 25.

To make a good Recognizance or obligation of Record, the form prescribed must be pursued; therefore they may not be acknowledged before any others, besides the persons appointed by the statutes; and the substantial forms of the statute are to be observed herein. But a Recognizance may be taken by the Judges in any part of *England*. *Dyer* 221: *Hob.* 195.

Recognizances and statutes are like judgments; and the Cognizee shall have the same things in execution, as after judgment. The body of the Cognizor himself, but not of his heir, or executor, &c. may be taken, though there be lands, goods, and chattels to satisfy the debt: and if a Cognizor is taken by the Sheriff, and he let him go; yet his lands and goods are liable. 12 *Rep.* 1, 2: *Plowd.* 62: 1 *And.* 273.

By Recognizances of debt, and bail, the body and lands are bound; though some opinions are, that the lands of bail are bound from the time of Recognizance entered into; and some that they are not bound but from the recovery of the judgment against the principal. 2 *Leon.* 84: *Cro. Jac.* 272. 449. See title *Bail*.

In *B. R.* all Recognizances are entered as taken in Court; but in *C. B.* they enter them specially where taken, and their Recognizances bind from the caption; but those in *B. R.* from the time of entry; in *C. B.* a *scire facias* may be brought on their Recognizances either in *London* or *Middlesex*; on those in *B. R.* in the county of *Middlesex* only. 2 *Salk.* 659.

A Recognizance of bail in *C. B.* is entered specially; the bail are bound to pay a certain sum of money, if the party condemned doth not pay the condemnation, or render his body to prison: and in *B. R.* Recognizances are entered generally; that if the party be condemned in the suit or action, he shall render his body to prison, or pay the condemnation-money, or the bail shall do it for him. 2 *Lil. Abr.* 417. See title *Bail*.

It was formerly a question, whether a *ca. sa.* would lie on a Recognizance taken in Chancery; but adjudged, that immediately after the Recognizance is acknowledged, it is a judgment on record; and then by *stat.* 25 *Ed.* 3. c. 17. a *ca. sa.* will lie, it being a debt on record. 2 *Bulst.* 62.

If a Recognizance be made before a Master in Chancery, for a debt, or to perform an order or decree of the Court; if the condition be not performed, an extent shall issue; or a *scire facias* is the proper process, for the Recognizor to shew what he can say, why execution should not be had against him; upon which, and a *scire facias* or two *nilis*

returned, and judgment thereupon, the proper execution is an *elegit*, &c. *Cro. Jac.* 3.

Where a man is bound by a Recognizance in Chancery, and the Cognizor hath certain indentures of defeasance; if the Recognizee will sue execution on the Recognizance, the Recognizor may come into Chancery, and shew the indentures of defeasance, and that he is ready to perform them; and thereon he shall have a *scire facias* against the Recognizee, returnable at a certain day; and in the same writ, he shall have a *supersedeas* to the Sheriff not to make execution in the mean time. *New Nat. Br.* 589.

If a person is bound in a Recognizance in Chancery, or other Court of Record, and afterwards the Recognizee dieth; his executors may sue forth an *elegit*, to have execution of the lands of the Recognizor; and if the Sheriff return that the Recognizor is dead, then a special *scire facias* shall go against the heir of the Recognizor, and those who are tenants of the lands which he had at the day of the Recognizance entered into. *New Nat. Br.* 590.

One of the best securities we have for a debt is the Recognizance in Chancery, acknowledged before a Master of that Court; which is to be signed by such Master, and afterwards enrolled: and the King may, by his commission, give authority to one to receive a Recognizance of another man, and to return the same into Chancery; and on such a Recognizance, if the Recognizor do not pay the debt at the day, the Recognizee shall have an *elegit* on the Cognizance so taken, as if it were taken in the Chancery. *New Nat. Br.* 589.

In case lands are mortgaged, without giving notice of a Recognizance formerly had, if the Recognizance be not paid off and vacated in six months, the mortgagor shall forfeit his equity of redemption, &c. *Stat. 4 & 5 W. & M. c.* 16. See title *Mortgage* III.

When a statute has been shewn in Court, and the plea discontinued, the Conusee, on a resummons, may have execution without producing it again. *Stat. 5 H. 4. c.* 12.

On a *scire facias* to defeat a Recognizance, the Conusor shall find surety to the party, as well as to the King. *Stat. 11 H. 6. c.* 10.

Recognizances for keeping the peace shall be returned to the Sessions. *Stat. 3 H. 7. c.* 1.

Recognizances for debt may be taken before the chief Justices, &c. *23 H. 8. c.* 6.

See further, titles *Statute-Merchant*; *Statute-Staple*; *Surety of the Peace*; and *18 Vin. Abr.* 163—170.

RECOGNIZEE, He to whom one is bound in a Recognizance, mentioned in *stat. 1 H. 6. c.* 10.

RECOGNIZOR, He who enters into the Recognizance.

RE-COMPENSATION. Where a party sues for a debt, and the defendant pleads compensation, the plaintiff may allege a compensation on his part, and this is called Re-compensation. *Bell's Scotch Dict.*

RECORD, *Recordum*, from the Lat. *Recordari*, to remember.] A Memorial or Remembrance; an authentic Testimony in writing, contained in rolls of parchment, and preserved in a Court of Record, *Britton c.* 27. In these rolls are contained the judgment of the Court on each case, and all the proceedings previous thereto; carefully registered, and preserved in public repositories, set apart for that purpose. The term *Record* is applied to such proceedings of superior Courts

only, and does not extend to the rolls of inferior Courts; the registries of proceedings whereof are not properly called Records. *Co. Litt.* 260. See title *Courts*.

All Courts of Record are the King's Courts in right of his Crown and royal dignity: and therefore no other Court hath authority to fine or imprison. A Court not of Record, is the Court of a private man; whom the Law will not intrust with any discretionary power over the fortune or liberty of his fellow-subjects. Such are the Courts Barons incident to every manor, and other inferior jurisdictions; where the Proceedings are not enrolled or recorded: but as well their existence, as the truth of the matter contained therein, shall, if disputed, be tried and determined by a Jury. 3 *Comm. c.* 3. *p.* 24.

There are three kinds of Records, *viz.* A *judicial Record*, as an attainder, &c. a *ministerial Record* on oath, being an office or inquisition found; and a *Record* made by conveyance and consent, as a *Fine*, *Recovery*, or a *Deed inrolled*. 4 *Repl.* 54. But it has been held, that a deed inrolled, or a decree in Chancery inrolled, are not *Records*, but a deed and a decree recorded; and there is a difference between a Record and a thing recorded. 2 *Lil.* 421.

Records, being the rolls or memorials of the Judges, import in themselves such incontrollable verity, that they admit of no proof or averment to the contrary, insomuch that they are to be tried only by themselves; for otherwise there would be no end of controversies; but during the term wherein any judicial act is done, the roll is alterable in that term, as the judges shall direct; when the term is past, then the Record admitteth of no alteration, or proof that it is false in any instance. *Co. Litt.* 260: 4 *Repl.* 52.

Matter of Record is to be proved by the Record itself and not by evidence, because no issue can be joined on it to be tried by a Jury like matters of fact; and the credit of a Record is greater than the testimony of witnesses. 21 *Car. B. R.* Though where matter of Record is mixed with matter of fact, it shall be tried by jury. *Hob.* 124.

A man cannot regularly aver against a Record; yet a Jury shall not be estopped by a Record to find the truth of the fact; and it was adjudged, that on evidence, it is at the discretion of the Court to permit any matter to be shewn to prove a Record. 1 *Vent.* 362: *Allen* 18.

A Record may be contradictory in appearance, and yet be good: And though it hath apparent falsehood in it, it is not to be denied; but a Record may in some cases be avoided by matter in fact. *Style's Reg.* 281: *Co. Litt. Cro. Car.* 329: *Hutt.* 20.

The judges cannot judge of a Record given in evidence, if the Record be not exemplified under seal: But a Jury may find a Record although it be not so, if they have a copy proved to them, or other matter given in evidence sufficient to induce them to believe that there was such a Record. 2 *Lill. Abr.* 421: See *post*, *Trial by Record*.

Judges may reform defects in any Record, or Process or variance between Records, &c. And a Record exemplified or inrolled may be amended for variation from the exemplification. *Stat.* 8 *H.* 6. *cc.* 12. 15. See *Amendment*.

If the transcript of a Record be false, the Court of *B. R.* will on motion, order a *Certiorari* to an inferior Court, to certify *how the Record is below*; and if it be on a writ of error on a judgment of the Common Pleas, they will grant a rule to bring the Record out of *C. B.* into this Court, and then order the transcript to be amended in

Court, according to the roll in *C. B.* And a Record cannot be amended without a rule of the Court, grounded on motion. 2 *Lill. Abr.* 421, 2.

Where a Record is so drawn, that the words may receive a double construction, one to make the Record good, and another to make it erroneous, the Court will interpret the words that way which will make the Record good, as being most for the advancement of Justice: So if a letter of a word in Record be doubtful, that it may be taken for one letter or another, the Court will construe it to be that letter which is for upholding the Record. See *Cro. Eliz.* 161: *Cro. Jac.* 119. 153. 244, &c.

The Court will not supply a blank left in a Record, to make it perfect, when before it was defective; as this would be to make a Record, which is not the office of the Court to do, but to judge of them. 2 *Lill. Abr.* 420. If a subsequent Record hath any relation to one that is precedent; in such case it must appear in pleading, &c. to be the same without any variation. 3 *Lutw.* 905.

Records certified out of inferior Courts, on writs of error, and the judgments on such Records are to be entered in *B. R.*; for until then the Records are not perfected: And if a Record once comes into *B. R.* by writ of error it never goes out again; but a transcript of it may go to the House of Lords, on a writ of error there. 2 *Lil.* 422. Writ of error removes the Record; but the original is no part of it. *Jenk. Cent.* 164. A Record cannot be removed by writ of error, until the judgment in that Record is entered: And when and how a Record may be removed, and where and how remanded, see *Cro. Jac.* 206: 2 *Brownl.* 145; and this Dict. tit. *Error*.

Justices of Assise, Gaol-delivery, &c. are to send all their Records and processes determined, to the Exchequer at *Michaelmas* in every year; and the Treasurer, and Chamberlains, on sight of the commissions of such Justices, are to receive the same Records, &c. under their seals, and keep them in the Treasury. *Stat. 9 Ed. stat.* 3. 1. c. 5.

IMBEZZLING or *vacating* RECORDS, (or falsifying certain other proceedings in a Court of Judicature,) is a felonious offence against public justice. It is enacted by *stat. 8 H. 6. c. 12.* that if any clerk, or other person, shall wilfully take away, withdraw, or avoid, (vacate,) any Record or Process, in the superior Courts of Justice in *Westminster Hall*; by reason whereof the judgment shall be reversed, or not take effect: It shall be felony not only in the principal actors, but also in their procurers and abettors. And this may be tried, either in the King's Bench, or Common Pleas, by a Jury *de medietate*, half Officers of any of the superior Courts, and the other half common Jurors. So by *stat. 21 Jac. 1. c. 26.* to acknowledge any *Fine, Recovery, Deed-inrolled, Statute, Recognizance, Bail, or Judgment*, in the name of another not privy to the same, is felony without clergy. This Law extended only to proceedings in the Courts themselves; but by *stat. 4 W. & M. c. 4.* to personate any other as bail before Judges of Assise, or the Commissioners in the Country, is also felony. See titles *Bail; Fine; Recovery, &c.*

A Record that is rased, if legible, remains a good Record notwithstanding the rasure; but he who rased it is not to go unpunished for his offence. And in case of a rasure in a judgment, done by fraud to hinder execution, the Record hath been ordered to be amended, and

a special entry thereof to be made; but though the Record by this means be made perfect, the offender may be indicted for the felony. 2 *Rot. Rept.* 81.

TRIAL BY RECORD, Is used where a matter of Record is pleaded in any action, as a *Fine*, a *Judgment*, or the like; and the opposite party pleads *nul tiel Record*, "that there is no such matter of Record existing."—Upon this issue is tendered, and joined in the following form: "And this he prays may be inquired of *by the Record*; and the other doth the like." And hereupon the party pleading the Record has a day given him to bring it in; and proclamation is made at the rising of the Court on that day, for him "to bring forth the Record by him in pleading alleged, or else he shall be condemned;" and, on his failure, his antagonist shall have judgment to recover, by rule of the Court, according to the circumstances of the case. The trial of this issue is merely by the Record, on the principle already stated.

Titles of Nobility, as whether Earl or no Earl, Baron or no Baron, shall be tried by the King's writ or patent only, which is matter of Record. 6 *Rept.* 53. Also in case of an alien, whether alien friend or enemy, shall be tried by the league or treaty between his Sovereign and ours, for every league or treaty is of Record. 9 *Rept.* 31: And, also, whether a manor be to be held in ancient demesne, or not, shall be tried by the Record of *Domesday* in the King's Exchequer. 3 *Comm. c.* 22. *p.* 330. See title *Ancient Demesne*.

Thus, also, upon the plea of a former judgment recovered by the plaintiff against the defendant for the same cause of action; or of another action depending on the same cause; or of outlawry; or of *compervuit ad diem* to a bail-bond; or of any act of Parliament; or, in short, of any other matter of Record, the general replication is *nul tiel Record*; upon which the parties join issue, and the truth or falsehood of such issue is determined by the party producing, or failing to produce, the Record in question, on a day given him for that purpose. *Sellon's Pract. c.* 13.

Where the Record pleaded is the Record of another Court, the only way of producing it is by suing out a *Certiorari* from the Court of Chancery, for the Court where the Record is to certify the Record; and upon the return of the *Certiorari*, but not till then, the Record will be sent by *mittimus* to the Court where it is to be produced: and thus a Record of *K. B.* may be removed into *C. B.* contrary to the general rule, that they are not removable out of that Court. *Cro. Car.* 297: 2 *Saund.* 344.

Where Records are pleaded, they must be shewn; and one may not plead any Record, if it be not in the same Court where it remaineth, unless he shew it under the Great Seal of *England*, if denied: Acts of Record must be specially pleaded. *Bro. c.* 20: *Cro. Jac.* 560: 5 *Rept.* 218: 10 *Rept.* 92: *Style* 22. Records are to be pleaded intire, and not part of them, with an *inter alia* referring to the Record; and so should a special verdict find a Record, unless a judgment be pleaded, or the declaration is on a judgment in a superior Court, when the plaintiff may say *recuperavit* generally; but not in an inferior Court, for there all the proceedings must be set forth particularly. *Mich.* 22 *Car. B. R.*

Though writs are matter of Record, they need not be so pleaded. 1 *Salk.* 1: 1 *Lev.* 211.

As to making up the Record of a cause for trial, see title *Pleading*.

The system of Records in *Scotland* is such as not only to preserve deeds, to give publicity to titles, and to the burthens by which lands are affected; but also to produce all the effects of an action, and to give a decree which may be the foundation of process capable of attaching the person or estate of a debtor.

RECORDS OF THE REALM. In the year 1800, in consequence of very extensive inquiries, and two Reports, made by a select committee of the House of Commons of *Great Britain* (printed by order of the House, 4th July 1800, in one very large folio volume), that House presented an address to His Majesty, requesting that he would be pleased to give directions for the better preservation, arrangement, and more convenient use of the public Records of the kingdom. A commission was accordingly granted by His Majesty, authorising several great officers of state, and learned members of the House of Commons and others, to carry into execution the several measures recommended in the Reports. In 1806 a second commission was granted. The Commissioners have proceeded from time to time with much diligence in the business of the commission; and have printed many useful indexes and other works of legal and historical importance. Their proceedings have been annually reported to his Majesty in his Privy Council. Abstracts of these annual Reports, and accounts of other proceedings of the Commissioners, were in April and June, 1807, laid before Parliament, and ordered by the house of lords to be printed. The commission remains still in force, and the labours of the Commissioners are continued with unceasing assiduity.

RECORDARI FACIAS LOQUELAM; (frequently abbreviated *Re-fa-lo.*) A Writ directed to the Sheriff to remove a cause, depending in an inferior Court, to the King's Bench or Common Pleas; and it is called a *Recordari*, because it commands the Sheriff, *to make a Record* of the *plaint* and other proceedings in the County-Court, and then to send up the cause. *F. N. B.* 71: 2 *Inst.* 339.

This Writ is in the nature of a *Certiorari*; on which the plaintiff may remove the plaint, from the County-Court, without cause; but a defendant cannot remove it without cause shewn in the writ, as on a plea of freehold, &c. If the plaint is in another Court, neither plaintiff nor defendant can remove it without cause. *Wood's Inst.* 572.

If a plea is discontinued in the county, the plaintiff or defendant may remove the plaint into the Common Pleas or King's Bench by *Recordari*, and it shall be good, and the plaintiff may declare on the same, and the Court hold plea thereof. *New Nat. Br.* 158.

The form of this Writ in the Register is, *Et Recordum illud habeas*, &c. But in a *Recordari* to remove a Record out of the Court of ancient demesne, the writ shall say, *Loquelam & processum*, &c. And there is a writ to call a Record, &c. to an higher Court at *Westminster*, called *Recordo & processu mittendis*. *Tab. Reg. Orig.* By the usual writ *Recordari*,—*The Sheriff is commanded, in his full Court, to cause to be recorded the plaint which is in the said Court between A. and B. of, &c. and have that Record before the Justices at Westminster, the day, &c. under the seals, &c. And to the said parties appoint the same day, that they be then there to proceed in that plea, as shall be just, &c.*

RECORDER, Recordator.] A person whom the Mayor and other Magistrates of any city or town corporate, having jurisdiction, and the Court of Record within their precincts by the King's grant, associate unto them for their better direction in matters of justice, and

proceedings according to Law: therefore he is generally a Counselor or other person experienced in the Law.

The Recorder of *London* is one of the Justices of *Oyer and Terminer*; and a Justice of Peace of the *Quorum*, for putting the Laws in execution for preservation of the Peace and Government of the city: And being the mouth of the City, he delivers the sentences and judgments of the Courts therein; and also certifies and records the City-Customs, &c. *Chart. K. Charles II.: Co. Lit.* 288. He is chosen by the Lord Mayor and Aldermen; and attends the business of the City, on any warning by the Lord Mayor, &c. See titles *London; Customs of London; Certificate*.

RECOVERY.

RECUPERATIO, from *Fr. recouvrer, recuperare*.] In a general sense, the obtaining any thing by judgment or trial of Law.

There is a *true Recovery* and a *feigned one*.

A *true Recovery* is an actual or real Recovery of any thing, or the value thereof, by judgment; as if a man sue for any land, or other thing movable or immovable, and have a verdict or judgment for him.

A *feigned Recovery* is a certain form or course set down by Law to be observed, for the better assuring lands or tenements: And the effect thereof is to discontinue and destroy estates-tail, remainders and reversions, and to bar the entails thereof. *West. Symb. part 2. title Recoveries, § 1.* See this Dict. title *Fine of Lands*.

The power of suffering a Common Recovery is a privilege inseparably incident to an estate-tail: and cannot be restrained by condition, limitation, custom, recognizance, statute, or covenant. See 1 *Burr.* 84. But the tenant in tail, in order to be entitled to such privilege, must be tenant in tail *in possession*, or he must have the concurrence of the prior freeholder, who claims under the same settlement. 2 *Burr.* 1072. See more fully *post*; and this Dict. title *Tail and fee-tail*.

A true Recovery is as well of the value as of the thing; For example, If I buy land of another with warranty, which land a third person afterwards by suit of law recovereth against me, I have my remedy against him who sold it me, to recover in value; that is, to recover so much in money as the land is worth, or other lands of equal value by way of exchange. *F. N. B.* 134: *Cowell*. And this rule will be found to pervade the whole of the present doctrine of *Recoveries*.

A Common Recovery is so far like a Fine, that it is a suit or action, either actual or fictitious: and in it the lands are recovered against the tenant of the Freehold; which Recovery, being a supposed adjudication of the right, binds all persons, and vests a free and absolute fee-simple in the recoveror.

Fines and *Recoveries* are now considered as mere forms of conveyances, or Common Assurances, the theory and original principles of them being little regarded. See 1 *Wils.* 73. Common Recoveries were invented by the Ecclesiastics, to elude the statutes of *Mortmain*; and afterwards encouraged by the finesse of the Courts of Law in 12 *E.* 4. in order to put an end to all fettered inheritances; and bar not only *Estates-tail*, but also all remainders and reversions expectant thereon. See further this Dict. titles *Mortmain; Tail and Fee-tail, &c.* In addition to what is said under those titles, and title *Fine of Lands*,

the following will serve to develop the original principle of these conveyances. And see *Cruise on Recoveries*.

A Recovery, in a large sense, is a restitution to a former right by solemn judgment: at Common Law, judgments, whether obtained after a real defence made by the tenant to the writ, or whether pronounced on his default or feint plea, had the same efficacy to bind the right of the land in question; and from hence men took an opportunity of making use of the decisions of the Court to their own advantage, and to the prejudice of others, who, though in some cases strangers to the action, yet were interested in the land for which it was brought. 2 *Inst.* 75. 429.

For, whilst these Recoveries were governed by the strict rules of Common Law, particular tenants, as tenant in dower, curtesy, in tail after possibility of issue extinct, and for life only, all those who had made leases for years, and those whose wives were entitled to dower, often took advantage of them; and by selling the lands, and suffering their purchasers to recover them, thereby defeated the right of those in remainder or reversion, &c.; which were inconveniences so great, that it was thought necessary to provide against them by positive laws: Thus the *stat. Westm. 2. 13 E. 1. c. 3.* makes provision for him in reversion, against the Recoveries suffered either by the tenant in dower, by the curtesy, or in tail after possibility of issue extinct, or for life; and by the 4th chapter of this statute, the wife is secured as to her dower; and the statute of *Gloucester, 6 Ed. 1. c. 11.*; and *stats. 7 Hen. 8. c. 4: 21 Hen. 8. c. 15.* have established the rights of termors, and enabled them to falsify such Recoveries. See *Co. Litt.* 104: *Kel.* 109: *F. N. B.* 468: *Plowd.* 57: *Doct. & Stud.* 45.

But there is no express provision made by any statute to preserve the interest of the issue in tail, or of him in reversion, against a Recovery suffered by the donee; yet it seems, that for two hundred years after the making the statute *De donis*, they were protected by that statute; therefore we find no express resolution, where such Recovery was allowed to bar the issue in tail, or those in remainder or reversion, till the reigns of *Ed. IV.* and *Hen. VII.* though in some cases the donee in tail was allowed to change the entail, and even to bar it. See 1 *Roll. Abr.* 342: *Co. Litt.* 343: 10 *Co.* 37: *Plowd.* 436: 2 *Inst.* 335: *Co. Litt.* 374: 4 *Leon.* 132, 133.

When these Recoveries were established as a common conveyance, and the best way of barring the issue in tail, and those in reversion or remainder, the tenant for life began to apply them once more to the prejudice of those who had the inheritance; and though the former statutes gave those who had the inheritance a remedy, yet the provision made by them being tedious and expensive, it was thought proper to make the *stat. 32 H. 8. c. 31*; which declared all such covinous Recoveries against the particular tenants to be void, in respect to him in reversion or remainder; and though the Judges very reasonably determined Recoveries against that act to be not only void, but a forfeiture of the particular estate, because it was a manner of conveyance as much known at that time as a fine or feoffment, therefore, by parity of reason, ought to have the same operation, yet that statute did not fully answer the end for which it was made. *Co. Litt.* 356, a: 1 *Co.* 15: *Vaughan* 51.

For if *A.* had been tenant for life, and made a lease for years to *B.*, and *B.* had made a feoffment in fee, if the feoffee had suffered a Re-

covery, and vouched the tenant for life, this was no void Recovery within the statute; because *A.* the tenant for life was not seised at the time of the Recovery, for the feoffment of the termor was a disseisin to *A.* and him in reversion; and the statute makes Recoveries of tenants for life in possession *only* void against them *to whom the reversion then belongs.* 10 Co. 45, *a*: Co. Litt. 362.

Yet where tenant for life bargained and sold his land in fee by indenture enrolled, and the bargainee suffered a Recovery, and vouched the bargainor, this was a void Recovery, and a forfeiture within the *stat. 32 H. 8. c. 31.*; for though the bargain and sale was of the inheritance, yet it passed only an estate for life of the bargainor, which was the greatest estate he could lawfully pass, consequently the reversioner was not divested; therefore the bargainee being a legal tenant for life in possession, the Recovery against him, though with a voucher of the bargainor, was void within that act against him in reversion, whose reversion was not turned to a right, as in the former case of a disseisin. 1 Co. 15: 1 Leon. 123.

But the former defect was cured by *stat. 14 Eliz. c. 8*; which repeals the said *stat. 32 H. 8. c. 31.* and declares all Recoveries (had by agreement of the parties, or *by covin*) against *tenant for life*, of any lands whereof he is so seised, or against any other with voucher over of him, *to be void*, as against the *reversioners* and their heirs.

These statutes made no provision for reversions or remainders *expectant* on estates tail; therefore, if there be tenant for life, remainder in tail, remainder in fee; and tenant for life suffers a Recovery, and vouches the remainder-man in tail, who vouches the common vouchee; this is so far from being a void Recovery within those statutes, that the reversion in fee is actually barred by it; for the intended recompence, which the remainder-man in tail is to have against the common vouchee, is to go in succession, as the estate-tail would have done; and it cannot be a covinous Recovery within the act, because the remainder-man in tail joined in it, who may at any time suffer such a Recovery to destroy the remainder in fee. 10 Co. 39, *b.* 45: Co. Litt. 362, *a*: 3 Co. 60, *b*: Cro. Eliz. 562: Moor 690: Cro. Eliz. 570.

These common Recoveries were no sooner allowed by the Judges to bar estates-tail, but men began to improve them into a common way of conveyance, and to declare uses on them, as on fines and feoffments. Hence it is, that the statutes, which provide against any alienations or discontinuances of particular tenants, provide at the same time against their Recoveries; thus *stat. 11 H. 7. c. 20.* declares *all Recoveries*, as well as other discontinuances by fine or feoffment of women tenants in tail, of the gift of their husbands, or their ancestors, to be void; so, a Recovery against husband and wife of the inheritance of the wife, without any voucher, is declared to be void within *stat. 32 H. 8. c. 28*: though the statute says, "suffered or done by the husband;" for this, like a feoffment by baron and feme is, in substance, the act of the baron only, and so within the statute; but a Common Recovery suffered by a feme covert, where her husband joins with her, is good to bar her and her heirs. *Doct. and Stud.* 54: Co. Lit. 326, *a*: 8 Co. 72: 10 Co. 43: 2 Inst. 342: 2 Roll. Abr. 205. See title *Baron and Feme*; and *post.* II: and *Cruise on Rec.*

- I. *The Nature of a Common Recovery; who may suffer it; of what Things it may be suffered.*
- II. *The Effect of a Recovery.* 1. *What Estates and Interests may be barred by a Common Recovery.* 2. *Of single and double Voucher, and Tenant to the Præcipe.* And, 3. *Of Deeds to lead or declare the Uses of a Recovery; (or Fine).*
- III. *Of erroneous and void Recoveries; who may avoid them, and by what Method; and see Div. 1.*

I. In order to explain the nature of a Common Recovery, *Blackstone* gives the following account of its progress: Premising that it is in the nature of an action at Law, not immediately compromised like a Fine, but carried on through every regular stage of proceeding. See 2 *Comm. c. 21.*

Let us, in the first place, suppose one *David Edwards*, to be tenant of the freehold, and desirous to suffer a Common Recovery, in order to bar all entails, remainders, and reversions, and to convey the same in fee-simple to *Francis Golding*. To effect this, *Golding* is to bring an action against him for the lands; and he accordingly sues out a writ, called a *Præcipe quod reddat*, because those were its initial or most operative words, when the Law proceedings were in Latin. In this writ the demandant *Golding* alleges that the defendant *Edwards* (here called the tenant) has no legal title to the land; but that he came into possession of it after one *Hugh Hunt* had turned the demandant out of it. The subsequent proceedings are made up into a Record or Recovery Roll, in which the writ and complaint of the demandant are first recited: whereupon the tenant appears, and calls upon one *Jacob Morland*, who is supposed, at the original purchase, to have warranted the title to the tenant: and thereupon he prays, that the said *Jacob Morland* may be called in to defend the title which he so warranted. This is called the *Voucher, vocatio*, or calling of *Jacob Morland* to warranty; and *Morland* is called the *Vouchee*. Upon this, *Jacob Morland*, the vouchee, appears, is impleaded, and defends the title. Whereupon *Golding*, the demandant, desires leave of the Court to *imparl*, or confer with the vouchee in private; which is (as usual) allowed him: and soon afterwards the demandant, *Golding*, returns to Court, but *Morland*, the vouchee, disappears, or makes default. Whereupon judgment is given for the demandant, *Golding*, now called the Recoveror, to recover the lands in question against the tenant *Edwards*, who is now the Recoveree: and *Edwards*, has judgment to recover of *Jacob Morland* lands of equal value, in recompence for the lands so warranted by him, and now lost by his default; which is agreeable to the ancient doctrine of *Warranty*. See that title. This is called the *Recompence*, or *Recovery in value*. But *Jacob Morland* having no Lands of his own, being usually the cryer of the Court, (who, from being frequently thus vouched, is called the *common vouchee*,) it is plain that *Edwards* has only a nominal recompence, for the lands so recovered against him by *Golding*; which lands are now absolutely vested in the said Recoveror by judgment of Law; and seisin thereof is delivered by the Sheriff of the County. So that this collusive Recovery operates merely in the nature of a conveyance in fee-simple, from *Edwards* the tenant in tail, to *Golding* the purchaser.

The Recovery, here described, is with a *single* voucher only: but sometimes it is with *double, treble*, or farther voucher, as the exigency

of the case may require. And indeed it is now usual always to have a Recovery with double voucher at the least; by first conveying an estate of freehold to any indifferent person, against whom the *precipe* is brought; and then he vouches the tenant in tail, who vouches over the common vouchee. For, if a Recovery be had immediately against tenant in tail, it bars only such estate in the premises of which he is then actually seised: whereas, if the Recovery be had against another person, and the tenant in tail be vouched, it bars every latent right and interest which he may have in the lands recovered. *Bro. Abr. tit. Taile, 32: Plowd. 8.* If *Edwards* therefore be tenant of the freehold in possession, and *John Barker* be tenant in tail in remainder, here *Edwards* doth first vouch *Barker* and then *Barker*, vouches *Jacob Morland*, the common vouchee; who is always the last person vouched, and always makes default: whereby the demandant *Golding* recovers the land against the tenant *Edwards*, and *Edwards* recovers a recompence of equal value against *Barker* the first vouchee; who recovers the like against *Morland* the common vouchee, against whom such ideal Recovery in value is always ultimately awarded. See *post. II.*

This supposed recompence in value is the reason why the issue in tail is held to be barred by a Common Recovery. For, if the Recoveree should obtain a recompence in lands from the common vouchee, (which there is a possibility in contemplation of Law, though a very improbable one, of his doing,) these lands would supply the place of those so recovered from him by collusion, and would descend to the issue in tail. *Doct. and Stud. b. 1. Dial. 26.* This reason will also hold with equal force, as to *most* remainder-men and reversioners; to whom the possibility will remain and revert, as a full recompence for the realty, which they were otherwise entitled to: but it will not *always* hold; and therefore the Judges have been even *astuti*, in inventing other reasons to maintain the authority of Recoveries. And, in particular, it hath been said, that, though the estate-tail is gone from the Recoveree, yet it is not *destroyed*, but only *transferred*; and still subsists, and will ever continue to subsist, (by construction of Law,) in the Recoveror, his heirs, and assigns: and, as the estate-tail so continues to subsist for ever, the remainders or reversions, expectant on the determination of such estate tail can never take place. 2 *Comm. c. 21.*

To such awkward shifts, such subtle refinements, and such strange reasoning, remarks the learned Commentator, were our ancestors obliged to have recourse, in order to get the better of that stubborn statute *De donis*. The design, for which these contrivances were set on foot, was certainly laudable; the unrivetting the fetters of estates-tail. Our modern Courts of Justice have therefore adopted a more manly way of treating the subject: by considering Common Recoveries in no other light, than as the formal mode of conveyance, by which tenant in tail is enabled to alien his lands. And it has therefore been avowed by the judges, that the true reason of Common Recoveries being bars, is not the recompence in value, though that is the foundation of almost all the arguments on the subject, but that they are common conveyances. See 2 *Lev. 28: Pig. Rec. 14: Vin. Abr. Recovery (A): Plowd. 514: Bac. Law Tr. 149: Com. Dig. Estates (B. 27.)*

Since, however, the ill consequences of fettered inheritances are now generally seen and allowed, and of course the utility and expe-

dience of setting them at liberty are apparent: it hath often been wished, that the process of this conveyance was shortened, and rendered less subject to niceties; by either totally repealing the statute *De donis*, which, perhaps, by reviving the old doctrine of conditional fees, might give birth to many litigations: See title *Tail and Fee-tail*: Or by vesting in every tenant in tail of full age the same absolute fee-simple, at once, which now he may obtain whenever he pleases, by the collusive fiction of a Common Recovery; though this might possibly bear hard upon those in remainder or reversion, by abridging the chances they would otherwise frequently have: as no Recovery can be suffered in the intervals between term and term, which sometimes continue for near five months together: Or, lastly, by empowering the tenant in tail to bar the estate-tail by a solemn deed, to be made in term time, and enrolled in some Court of Record; see 1 *P. Wms.* 91; which is liable to neither of the other objections; and is warranted not only by the usage of our *American Colonies*, and the decisions of our own Courts of Justice, which allow a tenant in tail (without Fine or Recovery) to appoint his estate to any *charitable* use; see title *Will*; but also by the precedent of the *stat. 21 Jac. 1. c. 19.* which in case of a bankrupt tenant in tail, empowers his Commissioners to sell the estate at any time, by deed indented and enrolled. See title *Bankrupts* III. 2. And if, in so national a concern, the emoluments of the Officers concerned in passing Recoveries, are thought to be worthy attention, those might be provided for in the fees to be paid upon each enrollment. 2 *Comm.* 361.

Infants are not capable of suffering Common Recoveries, on account of their want of understanding: although, if an Infant is permitted to suffer a Common Recovery in person, he must, as in the case of a Fine, and for the same reason, reverse it during his minority: which must be tried by inspection of the Judges; otherwise the Recovery will bind him for ever afterwards. But if an Infant suffers a Common Recovery, in which he appears *by Attorney*, he may reverse it at any time after he has attained his full age; as it may be tried by a Jury, whether he was an Infant or not when he appointed an Attorney, and which by Law, an Infant is capable of performing. *Cruise on Rec.*

It was formerly doubted, whether a Common Recovery bound an Infant who appeared by his Guardian: and the practice therefore was, when an Infant intended to suffer a Common Recovery, that he and his Guardian should petition the King to grant letters, under the Privy Seal to the Judges, of the Court of *C. B.* directing them to permit such Infant to suffer a Recovery: But it was still in the discretion of the Judges to permit the Infant to suffer it or not, according to the circumstances of his case: and if the Judges upon examination, found it necessary, or that it would be advantageous to the Infant, that he should suffer a Recovery, they then admitted persons of known integrity and fortune to appear as his Guardians, and to suffer a Recovery for him in Court: But these sort of Recoveries, suffered by Privy Seal, are now disused; and private acts of Parliament are universally substituted in their stead. *Cruise on Rec.*

An Infant Trustee may join in a Common Recovery, if he is directed so to do by the Court of Chancery. *Stat. 7 Ann. c. 19.* See further, title *Infant V.*

A Recovery, as well as a Fine, by a Feme-covert, is *good* to bar

her; because the *præcipe* in the Recovery answers the writ of covenant in the Fine to bring her into Court; where the examination of the Judges destroys the presumption of Law, that this is done by the coercion of her husband, for then it is presumed they would have refused her. 10 Co. 43, a: 2 Roll. Abr. 395.

Whenever a husband and wife appear in the Court of C. B. to suffer a Common Recovery, the wife is always privately examined as to her consent. And where a Warrant of Attorney is acknowledged before Commissioners appointed by a writ of *dedimus potestatem de Attornato faciendo*, by a husband and wife, the Commissioners are positively directed by a Rule of Court (*Hil. 14 Geo. 3.*) to examine the wife, separately and apart from her husband as to her free and voluntary consent to the suffering such Recovery. *Cruise on Rec.*

The King cannot suffer a Common Recovery; for if he does, he must be either tenant or vouchee: and, in both cases the demandant must count against him, which the Law does not allow. *Pig. 74: Plowd. 244.*

Idiots, Lunatics, and generally all persons of nonsane memory, are disabled from suffering common Recoveries, as well as from levying Fines; though, if an Idiot or Lunatic does suffer a Common Recovery, and appears in person, no averment can afterwards be made that he was an Idiot or Lunatic. But, if he appears by Attorney, it seems that such averment would be admitted upon the same principle, that an averment of *Infancy* may be made against a Warrant of Attorney, acknowledged by an Infant, for the purpose of suffering a Common Recovery; since the fact of Idiocy may be tried by a Jury, with as much propriety as the fact of Infancy. *Cruise on Rec.*

In a celebrated case (*Hume v. Burton*) determined by the House of Lords in *Ireland*, since the independence of that jurisdiction, the majority of the Judges were of opinion, that the caption of a Warrant of Attorney, taken by the Chief Justice of the Court of Common Pleas, for the purpose of suffering a Common Recovery, was not conclusive evidence of the capacity of the person acknowledging such Warrant of Attorney. See *Cruise on Rec.* and *Appendix to Vol. 2.*

Although no averment of Idiocy or Lunacy can be made against a Recovery, where the parties appear in person, yet evidence of weakness of understanding has been admitted on a trial in ejectment, to invalidate a deed to make a tenant to the *præcipe* for suffering a Recovery, and the Recovery has in that manner been set aside. *Cruise on Rec.* See further this Dict. titles *Fine of Lands IV: Idiots and Lunatics IV.*

By 47 Geo. 3. stat. 2. c. 8. It shall be lawful for every person not under Coverture (and for every Feme Covert, being solely and secretly examined by the lord of the manor or his steward) to appoint an attorney for the purpose of surrendering any copyhold premises of which a Recovery is to be suffered to the use of any person to make him tenant to the plaint: and to appoint any person to appear as vouchee, and to do any acts requisite for perfecting any such Recovery, and to direct the demandant in such Recovery to surrender the Tenements recovered, &c. and such Recoveries shall have the like effect as if the party had appeared in person.

As to persons restrained by statute from suffering Common Recoveries, see *ante*, the Introduction to the present title.

Recoveries, being now settled as common assurances to establish

men in their purchases, are very much favoured by the Judges, and not compared to judgments, in other real actions or adversary suits. 2 *Inst.* 353: *Poph.* 22, 23: 2 *Vent.* 32.

If a man be seised of a reputed manor, which really is no manor, and he suffers a Common Recovery of this *by the name of a manor*, this is a good Recovery of the lands which constituted the reputed manor, though strictly speaking there is no manor recovered; because the Law supports this, as all other conveyances, according to the intention of the parties: for it would be severe to vacate this conveyance, when the purchaser recovered them by the assent of the vendor under such a denomination. 2 *Rol. Abr.* 396: 6 *Co.* 64: 2 *Rol. Rep.* 67: 2 *Vent.* 32. S. P. See *Cro. Eliz.* 524. 707: and 1 *Keb.* 591. 691. *cont.*

So, if a Recovery be suffered of a manor with its appurtenances, lands which have been reputed parcel of the manor shall pass; for it is but equitable, *quod voluntas Domini volentis rem suam in alium transferre rata habeatur*; and though the Recovery does not mention the lands reputed parcel of the manor, but only the manor itself, yet this was supplied by the indenture; which was of the manor, and all lands reputed parcel thereof, and though occupied together but two years. 1 *Sid.* 190: 1 *Lev.* 27: 1 *Keb.* 591. 691: 2 *Mod.* 235. In all the books which report this case, (*Thynn v. Thynn*) it is said, that as to Sir *Molye Finch's* case (which see 6 *Co.* 33.) all the judges of *England* gave their opinions under their hands, that the lands in reputation, belonging to that manor, should not pass; but that *Coke*, after he was made Chief Justice, got it adjudged otherwise, and so it hath been held ever since; and well it was that it was so adjudged, because many settlements depended thereon.

If a man having a third part of a manor suffers a Recovery of a moiety, this is good to pass his interest in the third part; for where the words of a conveyance (which a Recovery is agreed to be) contain more than the grantor can convey, it would be an unreasonable interpretation to make this void and entirely useless, when they are sufficient to convey so much as he might lawfully pass; so if the Recovery had been in this case, of the third part of the manor, by the name of the moiety, part and purparty of the manor, this had been good for the whole third part, and not only for a moiety of the third. *Cro. Car.* 109, 110.

In ejectment a special verdict found, that there was a *parish* of *Ribton*, and the *vill* of *Ribton*, but the *latter* not of equal extent with the *former*; and that *J. S.* was seised of land in tail in the *parish*, but not in the *vill*; and bargained and sold the land in the *parish* of *Ribton*, with covenant to levy a Fine, and suffer a Recovery to the uses in the deed; but the Fine and Recovery were only of the lands in *Ribton*; the question was, Whether this Recovery would serve for the land in the *parish* of *Ribton*? The Court, in favour of Common Recoveries, extended this Recovery to the lands in the *parish* of *Ribton*; because the verdict found, that he who suffered the Recovery had no lands in the *vill*, consequently that the Recovery must be void, if not extended to the *parish*; and though *parishes* are not so ancient as *vills*, and therefore till lately were never inserted in writs, yet now they are, and the Law takes notice of them. 2 *Vent.* 31, 32: 1 *Mod.* 250: 2 *Mod.* 233: But for this see *Hut.* 105: *Cro. Car.* 269: 2 *Rol. Abr.* 20: *Cro. Jac.* 120. 574: 1 *Mod.* 206: 2 *Mod.* 47: 1 *Vent.* 143. 170: 1 *Mod.* 78: 2 *Keb.* 802. 821. 848: *Owen* 60: and 2 *Mod.* 236. which seems against

this case; but is reconcilable with this diversity, that in those cases there were lands on which the Fine might operate, *viz.* the lands in the *vill* of *Street*, without taking in the *parish* of *Street* to carry the lands in *Walton*, a *vill* of that *parish*; but here, if those in the *parish* should not pass, there were no other to pass. See *post*. III.

A Common Recovery in the Common Pleas of *Copyhold* lands, will not pass them: though it is said, if lands are *Customary Freeholds*, and pass by surrender in a Borough Court, a Recovery in *C. B.* of such lands will be good, 1 *Atk.* 474. but see *contra*, 2 *Ves.* 603. For the method of suffering Recoveries of Copyholds, see *Pig.* 100: *Bac. Abr. Copyhold (C.)*

Recovery may be suffered of a *Trust-estate*, by *Cestui que Trust*, as effectually as it may of a legal estate. 1 *P. Wms.* 91: 9 *Mod.* 143: *Fearne*.

See further, of what things a Recovery may be suffered, *Vin. Abr. Recovery (S.)*: *Wils.* 283: *Pig.* 97.

II. 1. THE FORCE and effect of common Recoveries may appear, from what has been said, to be an absolute bar, not only of all estates tail, but of remainders and reversions expectant on the determination of such estates. So that a tenant in tail may, by this method of assurance, convey the lands held in tail to the Recoveror, his heirs and assigns, absolutely free and discharged of all conditions and limitations in tail, and of all remainders, reversions, charges, and incumbrances dependent upon it. But, though a Common Recovery bars a contingent remainder, by destroying the particular precedent estate which supported it, yet it does not bar a springing use, nor an *Executory Devise*. *Pig.* 127. And it is a rule, that an *Executory Devise* cannot be prevented or destroyed, by any alteration whatsoever in the estate out of which, or after which, it is limited. *Fearne*, 3d edit. 306. See this Dict. titles *Executory Devise*; *Perpetuity*. If the remainder be an *abeyance*, a Common Recovery will bar it. 6 *Co.* 42, a. A term limited to commence, on failure of issue, may also be barred by a Recovery. 1 *Lev.* 35. So a power appendant, or in gross, is barable by a Recovery. *Pig.* 135. But a Recovery will not bar a Mortgage, because that is to be considered as a charge upon the estate, and cannot be defeated. 2 *Atk.* 591. Tenant in tail mortgaged for years, and died, without suffering a Recovery, the mortgage was held not good; but if he had suffered a Recovery afterwards, it would have let in the mortgage. 1 *Wils.* 276. As to the operation of a Recovery in general, by letting in all the preceding incumbrances and rendering valid all the preceding acts of tenant in tail, see *Pig.* 120. *Cruise on Rec.* 159. And as to the mode of guarding against a Recovery's letting in the incumbrances of the remainder-man, see 1 *Inst.* 203, b. *in n.*

By *stat.* 34 & 35 *Hen.* 8. c. 20. no Recovery had against tenant in tail, of the King's gift, whereof the remainder or reversion is in the King, shall bar such estate-tail, or the remainder or reversion of the Crown. See title *Tail and Fee-tail*. And by *stat.* 11 *Hen.* 7. c. 20. no woman, after her husband's death, shall suffer a Recovery of lands settled on her by her husband; or settled on her husband and her by any of his ancestors. And by *stat.* 14 *Eliz.* c. 8. no tenant for life, of any sort, can suffer a Recovery, so as to bind them in remainder or reversion. For which reason, if there be tenant for life, with remain-

mainder in tail, and other remainders over, and the tenant for life is desirous to suffer a valid Recovery; either he, or the tenant to the *præcipe* by him made, must *vouch* the remainder-man in tail; otherwise the Recovery is void: but if he does *vouch* such remainder-man, and he appears and *vouches* the common *vouchee*, it is then good; for if a man be *vouched* and appears, and suffers the Recovery to be had against the tenant to the *præcipe*, it is as effectual to bar the estate tail, as if he himself were the *Recoveree*. *Salk.* 571.

In all Recoveries it is necessary that the *Recoveree* or tenant to the *præcipe*, as he is usually called, be actually seised of the freehold, else the Recovery is void. *Pigot* 28. For all actions, to recover the seisin of lands, must be brought against the actual tenant of the freehold, else the suit will lose its effect; since the freehold cannot be recovered of him who has it not. And, though these Recoveries are in themselves fabulous and fictitious, yet it is necessary that there be *actores fabulæ*, properly qualified. But the nicety, thought by some modern practitioners to be requisite in conveying the legal freehold, in order to make a good tenant to the *præcipe*, is removed by the provisions of the *stat. 14 Geo. 2. c. 20*; which enacts, with a retrospect and conformity to the antient rule of law, that, though the legal freehold be vested in lessees, (for life) yet those who are entitled to the next freehold estate in remainder or reversion may make a good tenant to the *præcipe*;—that, though the deed or fine which creates such tenant be subsequent to the judgment of Recovery, yet if it be in the same term, the Recovery shall be valid in law; and that, though the Recovery itself do not appear to be entered, or be not regularly entered, on record, yet the deed to make a tenant to the *præcipe*, and declare the uses of the Recovery, shall, after a possession of twenty years, be sufficient evidence, on behalf of a purchaser for valuable consideration, that such Recovery was duly suffered. *2 Comm. c. 21*.—And by this act also, Common Recoveries shall, after twenty years from the time of suffering them, be deemed valid, if it appears on the face of such Recovery, that there was a tenant to the writ; and if the persons joining in such Recovery had sufficient estate and power to suffer the same; notwithstanding the deed or deeds for making the tenant to the *præcipe*, should be lost or not appear. For the operation of this statute, see *1 Burr.* 115: *2 Burr.* 1074.

Though the deeds to make a tenant to the *præcipe*, be not executed till after the execution of the writ of seisin still the Recovery will be good by *stat. 14 Geo. 2. c. 20*. if the deeds be executed in the term in which the Recovery is suffered. *2 H. Black.* 46: *5 Term Rep. K. B.* 177: *Goodright d. Burton v. Rigby*.

In respect to estates-tail, and barring them by Recovery, what is principally to be regarded is, that there must be a legal tenant to the *præcipe* at the time of the writ purchased, or at the return; for since estates-tail are only barred on account of the intended recompence, which is to follow the descent of the tail, where there happens to be no tenant to the *præcipe*, the demandant can really recover nothing; consequently the supposed tenant can have no recompence in value against the *vouchee*; for that is only given against the *vouchee*, in consideration of what the tenant lost. *Hob.* 262.

As if there be tenant for life, remainder in tail, remainder in fee, and tenant for life with the remainder in tail suffer a Recovery, with *voucher* over, this shall not bar the remainder in tail, nor the remain-

der in fee; because the remainder-man in tail was not tenant to the *præcipe*, consequently could not have the intended recompence, because that was given in lieu of the estate recovered, which was no greater than the estate for life, he only being legal tenant to the *præcipe*. 1 *Roll. Abr.* 395: *Dyer* 352: *Cro. Eliz.* 670: *Moor* 255, 256.

In a writ of error to reverse a Common Recovery, the tenant to the *præcipe* was made by a Fine, the Recovery was suffered, and the Fine reversed; yet it was held a good Recovery, for there was a good tenant to the *præcipe* at the time. 2 *Salk.* 568. See title *Fine of Lands*.

If a manor be given to a man and a woman, and the heirs of the body of the man begotten on the woman, and they intermarry, and then the husband suffers a Recovery of the whole manor; this is good for a moiety, because, the gift being made before marriage, they had each an undivided moiety, which they may transfer; but the Recovery can operate but for a moiety, because the husband only was tenant to the *præcipe*, consequently the demandant only could recover his interest in the manor, which was but a moiety. *Moor* 95. See this Dictionary, title *Baron and Feme*.

If lands are given to a man and his wife, and the heirs of the body of the husband, and a Recovery is had against him only, this Recovery will neither bar the reversion, nor the tail; for the recompence being to go in succession, as the estate which the tenant lost would have done, the husband could not lose all the land, because he was not a legal tenant to the whole, his wife being joint tenant with him who was no party to the writ; nor could the Recovery be good for a moiety, because there are no moieties between baron and feme, but both are considered as one person in Law; but if the husband had levied a fine, and the conusee suffered a Recovery, and vouched the husband, who vouched the common vouchee, this had been a good bar of the entail; for there the husband came in to defend the estate-tail, which the wife was a stranger to; and the assets which he recovered over is a recompence for the estate-tail, which he only had a right to, without the feme, and which the Law gives him a power to dispose of. *Moor* 210: 3 *Co.* 5: 2 *Roll. Abr.* 395: 4 *Leon.* 93: 1 *And.* 162: 2 *Salk.* 568.

In ejectment, on special verdict, the case was, *A.* seised in fee of the lands in question, hath issue *B.* his eldest son, *C.* his second, and *D.* his third son; on a marriage intended between *D.* his youngest son, and one *E.* he (*A.*) before the marriage, covenants to stand seised to the use of himself for life, remainder to *D.* and *E.* and the heirs male of their two bodies, remainder to *D.* and the heirs male of his body, remainder to *C.* and the heirs male of his body, remainder to *B.* and the heirs male of his body, Remainder to his own right heirs; *A.* dies, a *præcipe* is brought against one *Upton* as tenant of the freehold, and after, before the return of the writ, *D.* by bargain and sale conveys the land to *Upton* and his heirs, and the deed was enrolled after the return of the writ, and within six months; *Upton* vouches *D.* only, without his wife, and a common Recovery was suffered to the use of *D.* and his heirs; then *E.* dies, and after *D.* dies without issue male, having issue four daughters; and between them and *C.* in remainder was the question, what was barred by this Recovery? 1st, It was agreed on both sides, that here was a good tenant to the *præcipe*, the bargain and sale being made to *Upton* before the return, yet, it being enrolled in due time, the freehold was in *Upton*, *ab initio*. 2dly, That this settlement being made before marriage, when the husband

and wife took by moieties and not by intireties, the husband had absolute power over his own moiety; therefore, for that, the Recovery was an absolute bar; wherein this differs from the case of *Owen and Morgan*, (the preceding case,) 3 Co. 5. where they took by intireties. 3dly, That this Recovery was no bar to the other moiety of *E.* because she was not party; but her estate-tail in that continued untouched, though it was urged also to be a bar for her moiety, she dying first, and so her husband in as sole tenant of the whole *ab initio*; and that, during the coverture, the husband had power to make a good tenant of the whole; but the Court held otherwise. 4thly, It was held, that the estate-tail to *D.* and *E.* being determined, the remainder to *D.* in tail-male-general, and all the other remainders depending thereon, were barred absolutely by this Recovery; for *D.* coming in as vouchee, comes in privity and representation of all the estates he hath or had, consequently he comes in representation of the remainder to himself in tail-male-general, and then the recompence in value goes to that, and also, to all the other remainders depending thereupon, and by consequence all are barred by the Recovery. 3 Lev. 107.

Tenant in tail, in consideration of his son's marriage, covenants to stand seised to the use of himself and his heirs till the marriage, and then to the use of himself for life, and after to the use of his son and to the heirs of his body, and suffers a common Recovery with single voucher to this purpose, and then dies without issue: This Recovery did not bar the remainder expectant on the estate-tail, for the covenant had changed the estate-tail into a fee, consequently the recompence could not be in lieu of the entail; since the tenant to the *præcipe* was not seised of the estate-tail at the time of the Recovery suffered. *Yelv.* 51. But see 2 *Salk.* 619. which seems contrary.

A. tenant for life, remainder to *B.* in tail, the remainder to *C.* in fee, *A.* and *B.* join in a *Fine come ceo*, &c. to a stranger, who renders it to *A.* for life, remainder to *B.* and his heirs; afterwards *A.* and *B.* suffer a Recovery with single voucher to the use of *B.* and his heirs: This Recovery did not bar the remainder in fee, because by the render they were seised of a new estate, and *B.* was not either tenant in possession, or seised in right of the entail, consequently the recompence being given in lieu of the estate recovered, the tail could not be docked, nor the remainder-man barred by this Recovery, because the tenants to the *præcipe* were not seised of it at the time of the Recovery suffered. *Cro. Eliz.* 807: *Moor* 634.

* If the tenant in tail, to whom the estate has descended *ex parte materna*, suffers a Recovery, and declares the uses to himself in fee, the estate will descend to an heir on the part of the mother, even if he had the reversion in fee from his father: and *vice versâ*; but if he took the estate-tail by purchase, the new fee will descend to the heirs-general. 5 *Term Rep.* 104. If then a person who has inherited an estate tail from his mother, wishes to cut off the entail, and to make the estate descendible to his heirs on the part of the father; after the Recovery, he ought to make a common conveyance to trustees; and to have the estate re-conveyed back by them; by which means he will take the estate by purchase, which will then descend to his heirs general. 2 *Comm.* 362, *in n.*

2. As to the use of the single and double voucher, it has been already observed, that the tenant who loses the land has, on his vouch-

ing over, a recompence in value adjudged against his vouchee, which is to go in the same succession as the land recovered would have done: Now a Recovery with single voucher is sufficient to bar an estate-tail, where the tenant in tail is tenant to the *fræcipe*, and seised of the lands in tail at the time of the *fræcipe* brought against him; for the recompence in value must follow the descent of the land which he loses, and when that proves to be the estate-tail, then the issue is supposed to have an equivalent for it, consequently not prejudiced by the Recovery; but because a single voucher can bar only the estate which the tenant is seised of at the time of the *fræcipe* brought, and not any right which he hath, it was found necessary to admit the use of a double voucher; for if such tenant in tail discontinue the tail, and take back an estate, or disseise the discontinuee, a Recovery against him with a voucher over could not bar the estate-tail; for the recompence comes in lieu of the land recovered, which was the defeasible estate, consequently the issue has nothing in value for the estate-tail, without which he cannot be barred. *Bro. title Recovery. Yelv. 51: 3 Co. 5: Moor 256.*

But if in this case tenant in tail after dissesin had, either by fine, or release, made a tenant to the *fræcipe*, and came in himself as vouchee, and then vouched over the common vouchee; this double voucher had been sufficient to bar the tenant in tail, and his heirs, of every estate of which he was at any time seised; for when the tenant in tail comes in as vouchee, it is presumed he will and he has an opportunity to set up every title he had, to defeat the demandant; and since what he offered was not sufficient to bar the demandant, the Court takes it for granted, he had no other title than what he set up; therefore will give him but one recompence for all. *3 Co. 6, b: Plowd. 8: Cro. Eliz. 562: Popth 100: Moor 365: Hob. 263.*

Thus, if *A.* be tenant for life, remainder to *B.* in tail, and a stranger disseises *A.* and enfeoffs *B.* if a *fræcipe* be brought against *B.* and a Recovery suffered as usual, this shall not affect the estate-tail; because *B.* had only a right to that, and was not seised of it; and the recompence was not given in lieu of the tail, because the estate-tail was not in question, on the Recovery, for *B.* could not lose the estate he had not; but if in this case *B.* had made another tenant to the *fræcipe*, and came in himself as vouchee, this had barred the entail. *3 Co. 58, b: 2 Rol. Abr. 395.*

If *A.* be tenant for life, remainder to *B.* in tail, and *B.* disseises *A.* and suffers a common Recovery, himself being tenant to the *fræcipe*; this Recovery with a single voucher is sufficient to bar the estate-tail in *B.* because he was actually seised of that, at the time of the *fræcipe* brought against him; for his disseisin did not divest his own estate, but only gave him a defeasible estate for life, which was immediately merged in his remainder; because the estate for life, and his inheritance, could not subsist together at the same time in him. *2 Rol. Abr. 395.*

Thus we see how estates-tail are barred by Recoveries, and the uses of the single and double voucher; and in this respect the operation of a Recovery is correspondent to that of a Fine, for they are but different ways of transferring estates-tail for security of purchasers; but the operation of a Fine differs from a Recovery in respect to strangers who have reversions or remainders expectant on estates-tail; for a Fine does not bar them, unless they omit to make their claim with-

in five years after the estate-tail is spent, and their reversion or remainder becomes executed; but a Recovery reaches them immediately, and at the same time bars the estate-tail and all reversions and remainders on account of this supposed and imaginary recompence. *Co. Lit.* 372, a: 2 *Roll. Abr.* 396: *Moor* 156: *Bro.* title *Recovery*, 28. 55.

And as a Common Recovery suffered by tenant in tail bars all reversions and remainders expectant, so it avoids all charges, leases, and incumbrances made by those in reversion or remainder, and the Recoveror shall enjoy the land, free from any charge, for ever; as where he in remainder on an estate-tail, granted a rent-charge, and the tenant in tail suffered a Recovery; it was adjudged, that the grantee could not distrain the Recoveror; for since the rent was only at the first good, because of the possibility of the grantor's remainder coming in possession, when that possibility ceases, by the Recovery of tenant in tail, such grant must then become void. *Moor* 158: *Cro. Eliz.* 718: 1 *Co.* 62: 2 *Roll. Abr.* 396: *Moor* 154: 4 *Leon.* 150, &c.: *Poph.* 5, 6. See *ante* II.

Tenant to the *præcipe* may be made either by fine, feoffment, lease, and release, or by bargain and sale enrolled. *Wils.* 281. See further, *Vin. Abr. Recovery* (U): *Com. Dig. Recovery* (B. 3): *Pig.* 65. 72. As to the doctrine of tenant to the *præcipe* by *disseisin*, see 1 *Burr.* 60: 2 *Burr.* 1065. Tenant to the *præcipe* made by fine, Recovery suffered, Fine reversed; yet held a good Recovery, for there was a tenant at the time. 2 *Salk.* 568. For if the person against whom the *præcipe* is brought, be, at the time when the *præcipe* is sued, or at any time before judgment, actual tenant of the freehold, it is immaterial what becomes of it afterwards. 1 *Inst.* 203, *b. in n.*

Though there is no tenant to the *præcipe*, the Recovery is good against the party who suffered it, by way of estoppel; though not against remainder-men or strangers. 10 *Mod.* 45. And though the tenant for life keeps the possession, yet the Recovery will be good. *Pig.* 41. And a surrender by tenant for life shall be presumed on a Recovery of 40 years' standing. 2 *Stra.* 1129. 1267: see 2 *Burr.* 1069.

In every common Recovery where the vouchee shall personally appear, the writ of entry shall be sued out, and produced at the time of the recording of the Vouchee's appearance at the foot of the *præcipe* in such Recovery. *Reg. Gen. C. P. Trin.* 30 *Geo.* 3. 1 *H. Blackst.* 526, 7.

In every common Recovery wherein the Tenants, or Vouchee's Warrants of Attorney shall be taken under a *dedimus potestatem*, there shall be written on every copy of the *præcipe*, and of such Warrant of Attorney, the *allocatur* of the Lord Chief Justice or some other Justice in the same manner as on Fines taken by *dedimus potestatem*: and the copy of the *præcipe* and Warrants of Attorney with the *allocatur* thereon, shall be filed as directed by Rule of Court. *Hil.* 14 *Geo.* 3. And at the time of signing such *allocatur*, the writ of entry for such common Recovery shall be produced before the Judge signing such *allocatur*, who may mark such writ with his title, name, or initials; and such writ shall also be produced, at the time of the arraignment of such Recovery. *Reg. Gen. C. P. Trin.* 30 *Geo.* 3: 1 *H. Blackst.* 527.

No Common Recovery (or Fine) shall pass, unless the taking of the Warrants of Attornies be before one of the Justices or Barons at

Westminster, or a Serjeant; without an Affidavit being filed that the Commissioners taking the same are either Barristers of five years' standing or Solicitors or Attornies of some of the Courts at *Westminster*: or Judges of the Court of Session or Exchequer, or Advocates and Clerks to the Signet of five years' standing in *Scotland*. *Reg. Gen. C. P. Mich.* 39 *G. 3. Bos. & Pul.* 362.

3. If Fines or Recoveries be levied or suffered without any good consideration, and without any uses declared, they, like other conveyances enure only to the use of him who levies or suffers them. *Dyer* 18. And if a consideration appears, yet as the most usual fine, "*sur cognizance de droit come ceo, &c.*" conveys an absolute estate, without any limitations, to the cognizee: (see title *Fine*), and as Common Recoveries do the same to the Recoveror; these assurances could not be made to answer the purpose of family settlements; (wherein a variety of uses and designations is very often expedient,) unless their force and effect were subjected to the direction of other more complicated deeds, wherein particular uses can be more particularly expressed. The Fine or Recovery itself, like a power once gained in mechanics, may be applied and directed to give efficacy to an infinite variety of movements, in the vast and intricate machine of a voluminous family settlement. And, if these deeds are made previous to the Fine or Recovery, they are called deeds to lead the uses; if subsequent, deeds to declare them. As, if *A.* tenant in tail, with reversion to himself in fee, would settle his estate on *B.* for life, remainder to *C.* in tail, remainder to *D.* in fee; this is what, by Law, he has no power of doing effectually, while his own estate-tail is in being. He therefore usually, after making the settlement proposed, covenants to levy a Fine, (or, if there be any intermediate remainders, to suffer a Recovery,) to *E.* and directs that the same shall enure to the uses in such settlement mentioned. This is now a deed to lead the uses of the Fine or Recovery; and the Fine when levied, or Recovery when suffered, shall enure to the uses so specified, and no other: For though *E.* the Cognizee or Recoveror, hath a fee-simple vested in himself by the Fine or Recovery; yet, by the operation of this deed, he becomes a mere instrument or conduit-pipe, seised only to the use of *B.*, *C.*, and *D.* in successive order: which use is executed immediately, by force of the statute of Uses. Or, if a Fine or Recovery be had without any previous settlement, and a deed be afterwards made between the parties, declaring the uses to which the same shall be applied, this will be equally good, as if it had been expressly levied or suffered in consequence of a deed directing its operation to those particular uses. For by *stat. 4 & 5 Ann. c. 16.* indentures to declare the uses of Fines and Recoveries, made after the Fines and Recoveries had and suffered, shall be good and effectual in Law, and the Fine and Recovery shall enure to such uses, and be esteemed to be only in trust; notwithstanding any doubts that had arisen on the Statute of Frauds, 29 *Car. 2. c. 3.*, to the contrary. See 2 *Comm. c. 21.* and the Appendix in that volume; and this Dictionary, title *Uses*.

III. THE JUDGMENT obtained in a Common Recovery being a matter of record, and similar in almost every respect to a judgment in an adversary suit, can only be reversed by a writ of error: but no person has a right to bring such writ of error, unless he has an immediate interest in the lands whereof the Recovery was suffered; though

the right of bringing such writ is not forfeited to the Crown on an attainder for High Treason. *Cruise on Rec.*

A Recovery ought not to be reversed unless writs of *scire facias* are issued against the *terre-tenants* and the heir: because the errors in a Recovery ought not to be examined until all the parties interested in supporting it be before the Court: but this circumstance is discretionary, and not *stricti juris*. 3 *Mod.* 119. 274: *Holt* 614.

Nothing can be assigned for error in a Common Recovery, which contradicts the record; and therefore no incapacity in a vouchee can be assigned for error, where he appeared in person: but if a vouchee appears by attorney, an averment may then be made, either that such vouchee died before the day on which judgment was given; or that he laboured under some personal disability, which rendered him incapable of suffering a Recovery. See 1 *Wils.* 42: 4 *Rep.* 7: *Cro. Eliz.* 739. and *ante* I.

By *stat. 23 Eliz. c. 3.* it is enacted, that no Recovery, (Fine, &c.) shall be reversed for false or incongruous *Latin*; rasure, interlining, misentering of a Warrant of Attorney, or not returning of the Sheriff, or other want of form in words, and not in matter or substance. And by *stat. 10 & 11 W. 3. c. 14.* that no Recovery (Fine, or Judgment in a real action, &c.) shall be reversed or avoided, for any error or defect therein, unless the writ of error or suit for reversing such Recovery, &c. be brought and prosecuted with effect within twenty years after such Recovery suffered, &c. Saving the right of infants, femmes covertes, &c. so as they bring their writ of error within five years after their disabilities removed. By this latter statute, a writ of error must be brought within twenty years after the Recovery has been suffered; and not within twenty years after the title has accrued. *Cruise on Rec.* And by *stat. 21 Jac. 1. c. 26.* persons suffering Recoveries in the name of others are guilty of felony without benefit of clergy. See title *Fine of Lands VII.*

Recoveries are in certain cases permitted to be amended in order to avoid their being reversed, on a point of form only. But the Court of *C. P.* will not grant leave to amend on affidavit only: it must appear, on the face of the deed to lead the uses, that there is sufficient ground for an amendment; and that all parties interested assent at the time of the amendment. See 1 *H. Blackst.* 73: 1 *Bos. & Pul.* 137: 2 *Bos. & Pul.* 560. 578. 580, n. 455: 3 *Bos. & Pul.* 362: 2 *New Rep. C. P.* 431.

Where a Recovery is suffered of lands held in antient demesne, it must be reversed by writ of deceit. See title *Antient Demesne.*

A Common Recovery suffered in a copyhold Court can only be reversed by petition to the lord, in the nature of a writ of false judgment. But it seems that the lord of a manor is not, in all cases, bound to allow of any proceedings on such a petition. See *Show. P. C.* 67: 1 *Vern.* 367.

As a Common Recovery can only be reversed by a writ of error, or some proceeding of a similar nature, to which none are entitled, but those who have an immediate interest in the lands, the Law allows all *strangers*, whose interests are affected by a Recovery to falsify it, by entry, action, or plea. Thus, where a Recovery is suffered by tenant in tail, although the issue in tail cannot enter, because the Recovery operates as a discontinuance, yet he may bring a *formedon*, and if the Recovery is pleaded against him, he may falsify by pleading matter

to avoid it; but in cases of this kind he is restrained, in the same manner as in a writ of error, from pleading any thing contrary to the record. *Cruise on Rec.* cites *Booth* 77. As to the remedies for termors affected by Recoveries, see *ante*, the introduction to this title.

A Common Recovery may also be invalidated, circuitously, by evidence on a trial in ejectment. See *ante* I.

Although a Common Recovery can only be reversed by the Court of Common Pleas in the first instance, and by the Court of King's Bench upon a writ of error from the Court of Common Pleas, yet the Court of Chancery can, in fact, invalidate a Common Recovery, where it appears to have been obtained by fraud or imposition; by compelling the Recoveror to convey the estate to the person who is entitled in equity to have it, or by declaring the Recoveror to be a trustee for such person. And a Court of Equity will also restrain the operation of a common Recovery to those purposes for which it was intended, and will not allow it to have a more extensive effect. 2 *Eq. Ab.* 695: *Pre. Ch.* 435; and this Dictionary, title *Fine of Lands* VII.

It has been already observed, (see *ante* I.) that a Recovery suffered by an infant in person shall not bind him; but though he may avoid it, yet it cannot be done by any entry *in pais*, but by writ of error, and this too during his minority; for the judgment of the Court being on record must be set aside by an act of equal notoriety; but an infant may avoid a Recovery by writ of error, as well where he comes in as vouchee, as where he is tenant to the *præcipe*; for though (strictly speaking) the Recovery is not against him where he is not tenant to the *præcipe*, yet for the greater security of the purchaser, and to strengthen the Recovery by the use of the double voucher, the person, who really has the right to the land in demand, comes in as vouchee; and then, by vouching over the common vouchee, has one recompence for all his titles; consequently if he be the person who really loses the land, he ought in reason to reverse the Recovery, as well where he comes in as vouchee, as where he is seised of the land and is tenant to the *præcipe*. 1 *Rol. Abr.* 742: 1 *Lev.* 142.

If tenant in tail within age comes in as vouchee *by attorney* in a Common Recovery, he in remainder may assign this for error, for he is party in interest to the Recovery; and where a man's interest is bound by another's act, it is but reasonable he should be allowed to free himself from the mischief by taking advantage of any error in it. 1 *Rol. Abr.* 755. 796.

If *A.* be tenant in tail, remainder to *B.* and *A.* suffers an erroneous Recovery, and the common vouchee releases to the Recoveror; yet if *A.* dies without issue, *B.* may, notwithstanding the release, reverse it by writ of error; for the common vouchee is only called in for form, and as he has really no interest in or title to the land; so really neither does he make any recompence to the person who loses the land; therefore it were unreasonable to carry the notion of the imaginary recompence so far as to suppose him a real sufferer, and thereby give him the privilege of setting aside the conveyance, by which he is no way affected. *Cro. Eliz.* 2, 3.

In a writ of error to reverse a Recovery, suffered by an infant who appeared by guardian, the error assigned was in the entry of his admission by guardian, viz. *quod A. B. sequatur pro J. S.*; whereas it was objected, that since the infant was tenant to the writ, it ought to have been entered, that the guardian was admitted *to defend* for the

infant; but this exception was disallowed, because the words *ad sequend* for the infant, signify, the same with *ad defendend.*; for *ad sequend.* is to follow and attend the business and suit of the infant; and the guardian being assigned to do that, must likewise have been assigned to take care of, or take upon him the defence of the infant's suit. 2 *Saund.* 94, 95: 1 *Mod.* 48.

In error to reverse a Recovery, the errors assigned were: 1. That the writ of entry was brought of an advowson of a rectory, and of a rent issuing out of the rectory, which was a *bis petitum*, therefore the writ vicious; but this was disallowed, because the advowson and rectory are different things; for he who has the advowson has only the right of presentation; but he who has the rectory has the profits of the church, out of which the rent issues; consequently there can be no *bis petitum* in this case, because by the demand of the advowson of the rectory, and of the rent issuing out of the rectory, the demandant recovers more than by a demand of the rectory only: Another error assigned was in the demand of a rent or pension of four marks issuing out of the rectory, which is so uncertain a demand, a pension being a different thing from a rent, and recoverable in the Spiritual Court; but this was disallowed; because it is plain there is but one sum of four marks demanded, and the pension or rent must be synonymous here, because they are demanded as issuing out of the rectory; therefore the pension cannot be in nature of an annuity, which charges the person only, because it is expressly to issue out of the rectory. *Poph.* 23: 5 *Co.* 41, a.

In a writ of error to reverse a Common Recovery, the error insisted on was, that the warrant of attorney of the vouchee bore date before the *Summoneas ad warrantizand.* issued, yet the judgment was affirmed, because the vouchee may come in, if he will, before the *Summoneas ad warrantizand.* and make his attorney; therefore, to support the Common Recovery, it shall be presumed the vouchee was present in Court, and appointed his attorney; and so the *dedimus* for the warrant and the *Summoneas ad warrantizand.* void. 1 *Sid.* 213: 1 *Lev.* 130: *Raym.* 70.

RECOUPE, from the Fr. *recouper*] The keeping back or stopping something which is due; and in our Law, we use it for, to defalk, or discount; as if a person hath a rent of ten pounds out of certain lands, and he disseises the tenant of the land; in an assise brought by the disseisee, if he recover the land and damages, the disseisor shall *recoupe* the rent due, in the damages: so of a rent-charge issuing out of land, paid by the tenant to another &c. he may *recoupe* the same. *Terms de Ley:* *Dyer* 2. See title *Set-off*.

RECREANT, Fr.] Cowardly, faint-hearted. See title *Champion*.

RECTA PRISA REGIS, The King's right to Prisage or taking of one butt or pipe of wine before, and another behind the mast, as a custom for every ship laden with wines. *Edw.* I. in a charter of many privileges to the Barons of the Cinque-Ports, discharged them of this duty. *Cowell.* See titles *Prisage; Customs on Merchandise*.

RECTITUDO, Right or Justice; sometimes it signifies legal dues, a tribute or payment. *Leg. Ed. Confess.* c. 30: *Leg. Hen.* 1. c. 6.

RECTO, Right; *Breve de Recto; A Writ of Right*, which is of so high a nature, that as other writs in real actions are only to recover the possession of the land, &c. in question: this aims to recover the seisin, and the property, and thereby both the Rights of possession and property are tried together. *Co. Lit.* 158. See title *Writ of Right*.

It hath two species: Writ of Right-patent, and Writ of Right-close: the first is so called, because it is sent *open*, and is the highest writ of all others; lying for him who hath a fee simple in the lands or tenements sued for, against tenant of the freehold at least, and in no other case. *F. N. B.* 1, 2, &c. But this writ of Right-patent seems to be extended farther than originally intended; for a Writ of Right of Dower, which lies for tenant in dower is patent, as appears by *F. N. B.* 7. And the like may be said in some other cases, *Table Reg. Orig.* Also there is a special Writ of Right-patent in *London*, otherwise termed a Writ of Right according to the custom, which lieth of lands or tenements within the city, &c. The writ of Right-patent is likewise called *breve magnum de Recto. Reg. Orig.* 9: *Fleta, lib.* 5. c. 32.

A Writ of Right-close is brought where one holds lands and tenements by charter in antient demesne, in fee-simple, fee tail, or for term for life, or in dower, and is disseised; it is directed to the Bailiff of the King's manors, or to the lord of antient demesne, if the manor is in the hands of a Subject, commanding him to do Right in his Court: This writ is also called *breve parvum de Recto. F. N. B.* 11: *Reg. Orig.* 9: *Britton*, c. 120.

If a person seised in fee-simple dies seised of such estate, and a stranger doth abate and enter into the land, and deforce the heir; the heir may sue a Writ of Right-patent against the tenant of the freehold of the same land, or an assize of *Mort d'ancestor.* 11 *Ass.* 17.

In a Writ of Right-patent, the demandant is to count of his own seisin, or of the seisin of his ancestor; if one bring the writ as heir to an ancestor, he may lay the seisin and esplees as in pernancy of the profits of the lands in his ancestors; and where it is brought by a Bishop or Body-politic, seisin of the esplees is to be laid in themselves, or in their predecessors. *New. Nat. Br.* 10.

Where a Writ of Right-close is directed to the lord of whom the lands are holden, and he will not hold his Court to proceed on it; a writ shall issue requiring him to hold his Court, &c. And if the lord hold his Court, but will not do the demandant right, or delay it, the plea may be removed by the writ called *Tolt* into the County-Court of the Sheriff; and from thence by *Recordari* into the Common Pleas. *New Nat. Br.* 6, 7. See title *Writ of Right.*

Glanvil seems to make every writ, whereby a man sues for any thing due unto him, a Writ of Right. c. 10—12.

RECTO DE ADVOCATIONE ECCLESIE, A Writ which lay at Common Law, where a man had right of advowson, and the parson of the church dying, a stranger presented his clerk to the church; the party who had the right, not having brought his action of *quare impedit* nor *darrein presentation*, but having suffered the stranger to usurp on him; and it lay only where an advowson was claimed in fee to him and his heirs. *F. N. B.* 30. See title *Advowson* III. 3 *Comm.* c. 16.

RECTO DE CUSTODIA TERRÆ ET HÆREDIS, A Writ of *Right of Ward.*] A Writ which lay for him whose tenant, holding of him in chivalry, died in nonage, against a stranger who entered on the land, and took the body of the heir. By the *stat.* 12 *Car.* 2. c. 24. it is become useless as to lands holden *in capite*, or by knight's-service; but not where there is guardian in socage, or appointed by the last will and testament of the ancestor. For the form, see in *F. N. B.* 139: *Reg. Orig.* 161.

Guardian in socage was always, and still is, entitled to an action of *Ravishment of Ward* (*Ravishment de Gard*; see that title;) if his ward or pupil be taken from him; but then he must account to his pupil for the damages he so recovers. *Hale on F. N. B.* 139. And as he was entitled at Common Law to this *Writ of Right of Ward*, so it seems that he is still entitled to this antiquated remedy. 3 *Comm.* 141. But a more speedy and summary method of redressing all complaints relative to Wards and Guardians hath of late obtained, by an application to the Court of Chancery: which is the supreme guardian, and has the superintendent jurisdiction of all the infants in the kingdom. See title *Guardian* I. 3, 4; and *passim*.

RECTO DE DOTE; A Writ of Right of Dower, which lies for a woman who has received part of her Dower, and demands the residue against the heir of the husband, or his guardian. *F. N. B.* 7, 8. 147: *Co. Lit.* 32. 38. See title *Dower*.

RECTO DE DOTE UNDE NIHIL HABET; A writ of Right which lies in case where the husband, having divers lands or tenements, hath assured no Dower to his wife, and she thereby is driven to sue for her thirds against the heir, or his guardian. *Old Nat. Br.* 6: *Reg. Orig.* 170. See title *Dower*.

RECTO QUANDO (OR QUIA) DOMINUS REMISIT; A writ which lieth where lands or tenements, in the seigniorship of any lord, are in demand by a Writ of Right: if the lord in such case holdeth no Court (or hath waived his right) at the prayer of demandant or tenant, but sends to the King's Court his writ to put the cause thither for that time, (saving to him at other times the right of his seigniorship,) then this writ shall issue out for the other party, and hath its name from the words therein contained. *F. N. B.* 16. See title *Writ of Right*.

RECTO DE RATIONABILI PARTE, A Writ of Right lying between privies in blood, as brothers in *Gavelkind*, sisters, and other coparceners, for land in fee-simple. If there be two sisters, and the ancestor dieth seised of land in fee, and one of the sisters enters into the whole, and deforces the other, she who is deforced shall have the Writ of Right *de rationabili Parte*; to have her *reasonable* or proportionable *Part*: And if, where there are two sisters, after the death of the ancestor they enter and occupy in common as coparceners, and then one of them deforce the other to occupy that which is appendant or appurtenant to the messuage &c. which they have in coparcenary; she who is deforced shall have this writ. Also, if the ancestor were disseised of lands, and dieth, and one sister entereth into the whole land, and deforceth her sister, she shall have the writ against her other sister: For it lieth as well on a dying seised of the ancestor, if one sister enter on all, as where the ancestor doth not die seised; and it is a writ of right-patent, &c. *F. N. B.* 9: *New Nat. Br.* 19, 20.

In this writ the demand shall be of a certain portion of land, to hold in severalty; and voucher and view do not lie in it, because of the privy of blood; but in a *rationabili Parte* the view was granted, *an.* 15 *H.* 5; for that the ancestor did not die seised, &c. The process on the writ, after removing into *C. B.* is Summons, Grand Cape, and *Petit Cape*, &c. *F. N. B.* 9. See *Booth on Real Actions*.

RECTO SUR DISCLAIMER, A Writ which lies where the lord, in the Court of Common Pleas, avows on his tenant, and the tenant disclaims to hold of him; on which Disclaimer the lord shall have this

writ; and if he avers and proves that the land is holden of him, he shall recover back the land from the tenant for ever: this writ is grounded on the statute of *Westm. 2. c. 2. Old Nat. Br. 150.* See title *Disclaimer*.

RECTOR, *Lat.*] A Governor; *Rector Ecclesiæ Parochialis*, Is he who hath the charge and cure of a parish church. It has been held, that *Rector Ecclesiæ* is one who hath a parsonage where there is a vicarage endowed. And when dioceses were divided into parishes, the Clergy who had the charge in those places were called Rectors; afterwards, when their rectories were appropriated to monasteries, &c. the Monks kept the great tithes; but the Bishops were to take care that the Rector's place should be supplied by another, to whom he was to allow the small tithes for his maintenance; and this was the Vicar. See titles *Parson*; *Vicar*.

RECTORIAL TITHES; See title *Tithes*.

RECTORY, *Rectoria.*] Is taken *pro integrâ Ecclesiâ Parochiâ, eum omnibus suis juribus, frædiis, decimis, aliisque proventuum speciebus*. Spelm. Also the word *Rectoria* hath been often applied to the Rector's mansion, or parsonage-house. *Paroch. Antiq. 549.* See titles *Parson*; *Parsonage*.

RECTUM, Right; antiently used for a trial or accusation. *Bract. lib. 3.*

RECTUM ESSE; See *Rectus in Curia*.

RECTUM ROGARE. To petition the Judge to do Right. *Leg. Inæ. c. 9.*

RECTUM, *Stare ad Rectum*, To stand trial at Law, or abide by the justice of the Court. *Hoved. 655.*

RECTUS IN CURIA, *i. e.* Right in Court; one who stands at the bar, and no man objects any offence against him. *Smith de Repub. Angl. lib. 2. c. 3.* When a person outlawed hath reversed the outlawry, so that he can participate of the benefit of the Law, he is said to be *Rectus in Curia*.

RECUSANTS; See title *Papists*, I. 2; and also titles *Oaths*; *Non-conformists*.

RED, Sax. *ræd.*] Advice; and *redbana* is one who advised the death of another. See *Dedbana*.

RED BOOK OF THE EXCHEQUER, *Liber Rubeus Scaccarii.*] An ancient record, wherein are registered the names of those who held lands *per Baroniam* in the time of *Hen. II. Ryley 667.* It is a manuscript volume of several miscellaneous treatises, in the keeping of the King's Remembrancer, in his office in the exchequer; and hath some things (as the number of the hides of lands in many of our counties, &c.) relating to the times before the conquest. There is likewise an exact collection of the escuages under King *Hen. I., Rich. II.,* and King *John*; and the ceremonies used at the coronation of Queen *Eleanor*, wife to King *Hen. III., &c.*

REDDENDUM, Is used substantively for the clause in a lease, whereby the rent is reserved to the lessor; which antiently consisted of corn, flesh, fish, and other victuals. 2 *Repl. 72.*

In debt for rent, the plaintiff declared on a lease made 25 August 11 W. 3. of a messuage, &c. for seven years, to commence from the 24th day of June before; *Reddendum* quarterly at Michaelmas, St. Thomas's day, Lady-day, and Midsummer, three pounds ten shillings, the first payment to be made at Michaelmas then next; and assigned for breach that fourteen pounds of the rent was in arrear for one

year, ending 24 *December anno 13 Wil.* And on demurrer to this declaration, it was objected that on this lease there was no year could be ended on the 24th of *December*, but on *St. Thomas's day*, according to the *Reddendum*; which was held to be true, because where special days are limited in the *Reddendum*, the rent must be computed from those days, not according to the *habendum*; and that the rent is never computed from the *habendum*, but when the *Reddendum* is general, *i. e.* paying quarterly so much. 1 *Salk.* 141. See titles *Deed II.*; *Rent*; *Lease*.

REDDIDIT SE, *Hath rendered himself.*] Where a man procures bail for himself to an action in any Court at Law; if the party bailed, at any time before the return of the second *scire facias* against the bail, renders himself in discharge of his bail, they are thereby discharged. 2 *Lill. Abr.* 430. See titles *Bail*; *Scire facias against Bail*.

REDDITARIUS, A Renter; *Redditarium*, a Rental of a manor, or other estate. *Cartular. Abbat. Glaston. MS.* 92.

REDDITION, *Redditio.*] A surrendering or restoring; being also a judicial acknowledgment that the thing in demand belongs to the demandant, and not to the person so surrendering. See *stat. antiq.* 34 & 35 *H. 8. c.* 24.

REDDITUS ASSISUS, A set or standing Rent. See *Assisus*.

REDEEMABLE RIGHTS. Those rights which return to the conveyor or disposer of land, &c. upon payment of the sum for which such rights are granted. See titles *Mortgage*; *Rent-Charge*, &c.

RE-DELIVERY, A yielding and delivery back of a thing: if a person has committed a robbery, and stolen the goods of another, he cannot afterwards purge the offence by any Re-delivery, &c. *Co. Litt.* 69: *H. P. C.* 72. See titles *Robbery*; *Larceny*.

RE-DEMISE, A re-granting of lands demised or leased. See *Demise* and *Re-demise*.

REDEMPTION, *Redemptio.*] A Ransom or Commutation: By the old *Saxon* Laws, a man convicted of a crime paid such a fine according to the estimation of his head, *pro redemptione sua*.—Redemption is also applied to the payment of *Mortgages*, &c. See that title.

RE-DISSEISIN, *Re-disseisina.*] A Disseisin made by him, who once before was found and adjudged to have disseised the same man of his lands or tenements; for which there lies a special writ called a Writ of Re-disseisin. *Old Nat. Br.* 106: *F. N. B.* 188. See this Dict. titles *Disseisin*; *Assise of Novel Disseisin*.

REDRESS OF INJURIES. The more effectually to accomplish the Redress of Injuries, Courts of Justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger; by expounding and enforcing those laws, by which rights are defined, and wrongs prohibited: This remedy is therefore principally to be sought by application to these Courts of Justice; that is by civil suit or action. 3 *Comm.* 2.

REDUBBERS, Those that buy stolen cloth, and turn it into some other colour or fashion, that it may not be known again. *Britton*, c. 29: 3 *Inst.* 134: *Stat. Wallie*, 12 *E. 1. c.* 4.

REDUCTION, The *Scotch* term for an action for the purpose of repealing or rendering null and void some deed or claim against the party.

REDUCTION, and REDUCTION-IMPROBATION. The Reduction is a repossessory action by which deeds, services, decrees, or illegal acts by

any body corporate, may be rendered void. The action of Reduction has a certification which renders the deed called for, and not produced, incapable of receiving any effect until it be produced. The action of Improbation is founded on actual forgery, and the certification thereon has the effect of rendering the deed called for, and not produced, for ever void and null. The junction of the two actions, which forms what is called the Reduction-improbation, confers on the simple Reduction all the efficacy of the Improbation, and secures the person who uses it from all future trouble from the deed called for, if it be not produced in the action. *Bell's Scotch Dict.*

RE-ENTRY, from the Fr. *rentrer, rursus intrare*.] The resuming or retaking a possession lately had; as if a man makes a lease of lands, &c. to another, he thereby quits the possession; and if he covenants with the lessee, that, for non-payment of rent at the day, it shall be lawful for him to re-enter; this is as much as if he conditioned to take again the land into his own hands, and to recover the possession by his own act, without assistance of the Law. But words in a deed give no Re-entry, if a clause of Re-entry be not added. *Wood's Inst.* 140.

One may reserve a rent on condition in a feoffment, lease, &c. that if the rent is behind he shall re-enter, and hold the lands till he is satisfied, or paid the rent in arrear; and in this case if the rent is behind, he may re-enter; though when the feoffee, &c. pays or tenders on the land all the arrears, he may enter again. And the feoffor, &c. by this Re-entry, gaineth no estate of freehold, but an interest, by the agreement of the parties, to take the profits in the nature of a distress: Here the profits shall not go in part of satisfaction of the rent; but it is otherwise if the feoffor was to hold the land till he was paid by the profits thereof. *Litt.* 327: *Co. Litt.* 203.

The distinction, when the profits taken by the lessor after entry are, and when they are not, to be in satisfaction of the rent, is not admitted in equity; for the Courts of Equity will always make the lessor account to the lessee for the profits of the estate, during the time of his being in possession of it: and decree him, after he is satisfied the rent in arrear, and the costs, charges, and expences attending his entry, and detention of the lands, to give up the possession to the lessee; and deliver and pay him the surplus of the profits of the estate, and the money arising thereby. *1 Inst.* 283, (a) *in n.*

All persons who would re-enter on their tenants for non-payment of rent, are to make a demand of the rent; and, to prevent the Re-entry, tenants are to tender their rent, &c. *1 Inst.* 201. If there is a lease for years rendering rent, with condition, that, if the lessee assigns his term, the lessor may re-enter; and the lessee assigneth, and the lessor receiveth the rent of the assignee, not knowing or hearing of the assignment, he may re-enter notwithstanding the acceptance of the rent. *3 Rep.* 65: *Cro. Eliz.* 553. See further, title *Rent*.

A feoffment may be made upon condition, that if the feoffor pay to the feoffee, &c. a certain sum of money at a day to come, then the feoffor to re-enter, &c. *Litt.* § 322. See titles *Use*; *Entry*.

REEVE-LAND; See *Reveland*.

RE-EXCHANGE, The like sum of money, payable by the drawer of a Bill of Exchange, which is returned protested, as the Exchange of the sum mentioned in the bill, is, back again to the place whence it was drawn. *Lex Mercat.* 98. See title *Bill of Exchange*.

RE-EXTENT, A second extent on lands or tenements, on com-

plaint, that the former was partially made, &c. *Broke*, 313. See title *Extent*.

RE-FA-LO, The abbreviation of *Recordari facias loquelam*; See that title.

REFARE, from Sax. *reaf*, or *rafan*.] To bereave, take away, or rob. *Leg. Hen.* 1. c. 83.

REFERENCE, The sending any matter by the Court of Chancery to a Master; and by the Courts at Law to a Prothonotary, or Secondary, to examine and report to the Court.

In Chancery, by order of Court, irregularities, exceptions, matters of account, &c. are referred to the examination of a master of that Court. In the Court of *B. R.* matters concerning the proceedings in a cause, by either of the parties, are proper matters of Reference under the Secondary, and for him in some ordinary cases to compose the differences betwixt them; and in others to make his report how the matters stand, that the Court may settle the differences according to their rules and orders.

If a question of mere law arises in the course of a cause in Chancery, as whether, by the words of a will, an estate for life or in tail is created; or whether a future interest devised by a testator shall operate as a remainder on an executory devise; it is the practice of that Court to refer it to the opinion of the Judges of the Court of *K. B.* or *C. P.* upon a case stated for that purpose, wherein all the material facts are admitted, and the point of law is submitted to their decision; who thereupon have it solemnly argued by counsel on both sides, and certify their opinion to the Chancellor: and on such a certificate the decree is usually founded. It seems that the Master of the Rolls, sitting for the Chancellor, may make such Reference; but not when sitting at the Rolls. 2 *Bro. C. C.* 88. The Court of Exchequer is both a Court of Law and Equity; therefore, if a question of mere Law arises in the course of the exercise of its equitable jurisdiction, the Barons will decide upon it in that suit, without referring it to another jurisdiction. 3 *Comm.* 452, 3. and *n.*—As to Reference to Arbitration, see title *Award*.

REFERENDARY, *Referendarius*.] An Officer abroad, of the same nature as Masters of Request were to the King among us; The Referendaries being those who exhibit the petitions of the people to the King, and acquaint the Judges with his commands. And there was such an Officer in the time of the *English Saxons* here. *Spelman*.

REFORMATION OF RELIGION; The change from the Catholic to the Protestant Religion, and the destruction of the Power of the Pope in these kingdoms; which commenced in the reign of *Hen. VIII.*, and was established, after some interruption, in the reign of Queen *Elizabeth*; and finally sanctioned at the Revolution, on the abdication of *James II.* See titles *Papists*; *Uniformity*; *Church*; &c. In *Scotland* what is called the Reformation, took place in 1560, and was established by the Act 1567. c. 2.

REFUSAL, Is where one hath by Law a right and power of having or doing something of advantage to him, and he declines it. See title *Executor*.

There is a Refusal by the Bishop to admit a clerk presented to a church, for illiterature, &c.; in which case, if a Bishop once refuses a clerk for insufficiency, he cannot accept of him afterwards, if a new clerk is presented. 5 *Rep.* 58: *Cro. Eliz.* 27. See titles *Parson*; *Quare Impedit*.

In Trover, a demand of the goods, and Refusal to deliver them, must be proved, &c. 10 *Reph.* 56. See title *Trover*.

REGALE EPISCOPORUM, The temporal rights and privileges of a Bishop. *Brady*.

REGALES, The King's servants or officers. *Walsingham*, anno 1291.

REGAL FISHES, Whales and sturgeons, some add porpoises. See *stat. antiq.* 1 *Eliz.* c. 5; and this Dictionary, titles *King*; *Queen*.

REGALIA, *Jura omnia ad Fiscum spectantia*; *Spelman*.] The Royal Rights of a King, which the *Civilians* reckon to be six, viz. Power of judicature; of life and death; of war and peace; masterless goods, as waifs, estrays, &c.; assessments; and minting of money. See title *King*.

The Crown, sceptre with the cross, sceptre with the dove, St. Edward's staff, four several swords, the globe, the orb with the cross, and other articles used at the Coronation of our Kings, are commonly called the Regalia. See the relation of the Coronation of King Charles II. in *Baker's Chronicle*.

Regalia is sometimes taken for the dignity and prerogative of the King; and these the feudal writers distinguish into the *majora* and *minora Regalia*: The former comprehending what relates to his power and dignity: the latter to his *fiscal* or pecuniary prerogatives. 1 *Comm.* 241. See title *King V*.

Regalia is also taken for those rights and privileges which the church enjoys by the grants and other concessions of Kings, and sometimes for the patrimony of the Church; as *Regalia Sancti Petri*, &c. It signifies also those lands and hereditaments which have been given by Kings to the Church, viz. *Cepimus in manum nostram baroniam & Regalia quæ archiepiscopus Eborum de nobis tenet*. *Prynne lib. Angl.* ii. 231. These, whilst in the possession of the Church, were subject to the same services as all other temporal inheritances: and after the death of the Bishop, they of right returned to the King, until he invested another with them; which, in the reign of William the Conqueror, and some of his immediate successors, was often neglected or delayed; and as often the Bishops complained thereof. This appears in *Ordericus Vitalis*, lib. 10, and other writers in those days. *Neubrigensis*, lib. 3. cap. 26. tells us, they complained against Henry II. for the same cause.

REGALIA FACERE, to do homage or fealty when he is invested with the Regalia. *Malsbury, de Gestis Pontificum*, p. 129, *de Anselmo*.

REGALITY, Was a territorial jurisdiction in Scotland granted with land from the Crown. The lands were said to be given in *liberam Regalitem*; and the persons receiving the right were termed Lords of Regality. The civil jurisdiction of the Lord of Regality was equal to that of the Sheriff; but his criminal jurisdiction was much more unbounded, as he was competent to judge in the four pleas of the crown, and possessed the same criminal jurisdiction with the Justiciary, excepting in the case of treason; and a criminal amenable to a Court of Regality might have been repledged from the Sheriff, or even from the Court of Justiciary. These jurisdictions were abolished by the operation of the statute 20 *Geo.* 2. c. 50.

REGARD, *Regardum*; *rewardum*: Fr. regard; *aspectus*, *respectus*.] Signifie, generally, any care or diligent respect: yet it hath also a special acceptance, wherein it is only used in matters of the Forest;

either for the office of Regarder, or for the compass of the ground belonging to that office. *Crom. Jur.* 175. 199. Touching the former, see *Manwood, part 1.* 194. & 198. And touching the second signification, the compass of the Regarder's charge is the whole Forest; that is, all the ground which is parcel of the forest, for there may be woods within the limits of the forest, that are no parcel thereof, and those are without the Regard. *Manwood, part 2. c. 7. num. 4.* And see *stat. 20 Car. 2. c. 3.* As to the Court of Regard, and the office of Regarder, see this Dictionary, title *Forest*.

REGARDANT, *Fr.* seeing, marking, vigilant.] As a Villein Regardant was called, Regardant to the Manor, because he had the charge to do all base services within the same, and to see the same freed of all things that might annoy it. This word is only applied to a villein or nief, yet in old books it was sometimes attributed to services. 1 *Inst.* 120. A Villein *Regardant*, it seems, was rather so called because annexed to the manor; *regarding*, or relating to it. See titles *Villein; Tenure*.

REGARDER, *Regardator, Fr. regradeur, spectator.*] The officer of the King's Forest, who is sworn to make the regard of it; and has been used in antient time, to view and inquire of all offences of the forest, as well of vert as of venison; and of concealment of any offences or defaults of the foresters, and all other officers of the King's Forest, relating to the execution of their offices, &c. *Cromp. Jurisd.* 153: *Manwood*.

This officer was ordained in the beginning of the reign of Henry II. Regarders of the Forest must make their regard, before any General Sessions of the Forest, or Justice Seat, can be holden; when the Regarder is to go through the Forest, and every bailiwick, to see and inquire of the trespasses therein; *ad videndum, ad inquirendum, ad inbreviandum, ad certificandum, &c.* *Manw. part 1. p.* 194. A Regarder may be made either by the King's letters patent; or by any of the Justices of the forest, at the General Eyre, or such times as the regard is to be made, &c. *Manw.* See title *Forest*.

REGE INCONSULTO, A Writ issued from the King to the Judges, not to proceed in a cause which may prejudice the King, *until he is advised.*

James I. granted the office of *supersedeas* in C. B. to one Mitchel, and thereupon Brownlow, Chief Prothonotary, brought an assise against him; and the defendant Mitchel obtained the King's writ to the judges, reciting the grant of this office, commanding them not to proceed *Rege inconsulto*; And it was argued against the writ, that the Court might proceed, because the writ doth not mention that the King had a title to the thing in demand, nor any prejudice which might happen to the King, if they should proceed: The cause was compromised. *Moor* 844.

A *Rege inconsulto* may be awarded, not only for the party to the plea, but on suggestion of a stranger; on cause shewn that the King may be prejudiced by the proceeding, &c. *Jenk. Cent.* 97.

A Writ of *Rege inconsulto* does not lie, but when it appears plainly to the Court, that the party's title is in disaffirmance of the King's title. *Hardr.* 179.

When the defendants will not pray in aid, this writ is in nature thereof, to inform the Court how it concerns the Crown, and to inhibit their proceedings. See 9 *Rept.* 16. a: *Cro. Eliz.* 417. Where the

tenant or defendant does not pray in aid, but a writ *de Domino Rege inconsulto* is brought, and directed to the Judges, and it appears to the Court, that the cause is not available or sufficient in Law, the Court ought to disallow the writ, and proceed in the action; and if the cause appears to the Court to be just and lawful, and not brought for delay, then the Judges ought to surcease. See 2 *Inst.* 269: *And.* 280: *Mo.* 421. And further *Vin. Abr.* title *Rege inconsulto*.

REGENT; See titles *King V. 2: Queen*.

REGIAM MAJESTATEM, A Collection of the antient Laws of Scotland: Another of these books is entitled *Quoniam Attachiamenta*, both being termed from the Initial Words. The Regiam Majestatem is said to have been compiled by order of David I. King of Scotland; who reigned from 1124 to 1153.

REGIO ASSENSU, A Writ whereby the King gives his Royal Assent to the election of a Bishop. *Rég. Orig.* 294.

REGISTER, more correctly *Registrar; Registrarius.*] An officer who writes and keeps a Registry. See *Registry*.

Register is the name of a book, wherein are entered most of the forms of writs, original and judicial, used at Common Law, called the Register of Writs. *Coke* affirms, that this Register is one of the most antient books of the Common Law. *Co. Lit.* 159.

Blackstone terms it the most antient and highly venerable collection of legal forms, upon which *Fitzherbert's Natura Brevium* is a comment: and in which every man who is injured will be sure to find a method of relief, exactly adapted to his own case, described in the compass of a few lines, and yet without the omission of any material circumstance. 3 *Comm.* 183.

REGISTRY, *Registrum*, from the old Fr, *gister*, i. e. *in lecto reponere.*] Properly the same with Repository: The office books, and rolls wherein the proceedings of the Chancery, or any Spiritual Court, are recorded, &c. are called by this name.

REGISTRY, OR REGISTER OF THE PARISH CHURCH, *Registrum Ecclesie Parochialis.*] That wherein baptisms, marriages, and burials are registered in each Parish every year; which was instituted by Lord Cromwell, anno 13 Henry VIII., while he was vicar general to that King.

These Parish Registers are to be subscribed by the Minister and Churchwardens; and the names of the persons shall be transmitted yearly to the Bishop, &c. See title *Marriage*.

REGISTER, OR REGISTRY OF DEEDS. The registering of Deeds and Incumbrances is a great security of titles to purchasers of Lands, and to mortgagees; and some laws have been made requiring the same. By *stat. 2 Ann. c. 4*, A Registry is to be kept of all Deeds and Conveyances affecting lands, executed in the *West Riding of Yorkshire*, and a public office erected for that purpose; and the Register is to be chosen by freeholders having 100*l.* *per annum*, &c. The *stat. 6 Ann. c. 35.* ordains, that a Memorial and Registry of all Deeds, Conveyances, Wills, &c. which affect any lands or tenements, shall be made in the *East Riding of the county of York*; and the Register is to be sworn by the justices in Quarter Sessions, and every leaf of his book signed by two Justices.

By *stat. 8 Geo. 2. c. 6*. A Registry shall be of all Deeds made in the *North Riding of the county of York*. Memorials of Wills must be registered within six months after the death of the testator; the Register neglecting his duty, or guilty of fraudulent practices, shall

forfeit his office, and pay treble damages; and persons counterfeiting any Memorial, &c. be liable to the common penalties of forgery.

By *stat. 7 Ann. c. 20.* A Memorial and Registry is to be made of all Deeds and Conveyances, and of all Wills, whereby lands are affected, &c. in the county of *Middlesex*, in the like manner as in the *West* and *East Ridings* of *Yorkshire*.

Deputy of the Chief Clerk of the King's Bench, appointed a Register for *Middlesex*, instead of the Chief Clerk. *25 Geo. 2. c. 4.*

It is provided, by *stat. 5 Ann. c. 18.* and subsequent statutes, that *Bargains and Sales* may be inrolled with the Register, and shall be as valid as if inrolled according to *stat. 27 H. 8. c. 16.* See titles *Bargain and Sale; Inrolment.*

It is observed by *Blackstone*, that however plausible these Provisions as to a Registry may appear, in theory, to remedy the inconvenience arising from the want of notoriety attendant on modern Deeds, it has been doubted by very competent judges, whether more disputes have not arisen in those counties, by the inattentions and omissions of parties, than have been prevented by the use of Registers. *2 Comm. c. 20.*

By these statutes, Deeds, Conveyances, and Wills, shall be void against subsequent purchasers or mortgagees, unless registered before the Conveyances under which they claim; also no judgment, statute, or recognizance, shall bind any lands in those counties, but from the time a Memorial thereof shall be entered at the Register's office; but the acts do not extend to Copyhold Estates, Leases at a Rack Rent, or to any Leases, not exceeding twenty-one years, where the possession goes with the lease; nor to any Chambers in the Inns of Court.

In *Scotland* Registration has the effect of giving a creditor a lien on the effects of a debtor, and entitling him to the effect of, a decree for the same.

REGISTRY OF PAPISTS' ESTATES: See this Dict. title *Papists* II. 4.

REGIUS PROFESSOR, A Reader of Lectures in the Universities, founded by the King: King *Hen. VIII.* was the founder of five Lectures in each University of *Oxford* and *Cambridge*, viz. of Divinity, Greek, Hebrew, Law, and Physic; the Readers of which are called in the University statutes *Regi Professores.*

REGNI POPULI, A name given to the people of *Surry* and *Sussex*, and on the sea-coasts of *Hampshire.* *Blount.*

REGNUM ECCLESIASTICUM. In some countries, formerly, the Clergy held there was a double supreme power, or two kingdoms, in every kingdom; the one a *Regnum Ecclesiasticum*, absolute and independent of any but the Pope, over ecclesiastical men and causes, exempt from the Secular Magistrate; the other a *Regnum Seculare*, of the King or Civil Magistrate, which had subordination and subjection to the ecclesiastical kingdom; but these usurpations were exterminated here by *Henry VIII.* *2 Hale's Hist. P. C. 324.*

REGRATOR, *Regratorius.*] It originally signified one who bought provisions, in order to sell them again for gain; and such person was considered antiently as an enemy to the Community. It is now confined to persons buying and selling again in the same market, or within four miles thereof. See *Spelm. v. Regratorius*; and this Dictionary, title *Forestaller.*

REGRESS, LETTERS OF. These were granted by the Superior of lands, mortgaged to the Wadsetter or Mortgagor; their object was

this.—By the Wadset or Mortgage the Mortgagor was completely divested, and when he redeemed he appeared to claim an entry from the Superior as a stranger; and the Superior was no more bound to receive the mortgagor than he could have been forced to receive any third party: to remedy this, letters of Regress were granted by the Superior, under which he became bound to re-admit the Mortgagor at any time when he should demand entry. *Bell's Scotch Dict.* See now the *stat.* 20 G. 2. c. 50.

REGULARS, *Regulares.*] Such as professed to live under some certain rule; as Monks, or Canons Regular, who ought always to be under some rule of obedience. See title *Clergy*.

REGULUS, SUBREGULUS, Words often mentioned in the Councils of the *English Saxons*. The first signifies *Comes*, the other *Viccomes*. But in many places they signify the same dignitary; as in the old book in the archives of *Worcester cathedral*. *Cowell.* See *Subregulus*.

REHABERE FACIAS SEISINAM, *Quando Vicecomes liberavit seisinam de majore parte, quam deberat.*] A Writ judicial; of which there is another of the same name and nature. *Reg. Judic.* 13. 51. 54. It lay when the Sheriff in the *Habere facias seisinam* had delivered more than he ought.

REHABILITATION, *Rehabilitatio.*] A restoring to former ability: It was one of those exactions claimed by the Pope heretofore in *England*, by his bull or brief, for re-enabling a spiritual person to exercise his function, who had been disabled. See *stat.* 25 H. 8. c. 21; and titles *Papists*; *Rome*; *Pope*.

REIF, *Sax. refian spoliare.*] Robbery. *Cowell.*

REJOINER, *Rejunctio.*] The answer or exception of a defendant in any action to the plaintiff's replication. It ought to be a sufficient answer to the replication, and follow and enforce the matter of the bar pleaded. *Abr.* 433. See titles *Departure*; *Pleading*.

RELATION, *Relatio.*] Is, where, in consideration of Law, two different times or other things are accounted as one; and by some act done, the thing subsequent is said to take effect by Relation from the time preceding: as if one deliver a writing to another, to be delivered to a third person as the deed of him who made it, when such third person hath paid a sum of money; now, when the money is paid, and the writing delivered, this shall be taken as the deed of him who made and delivered it, at the time of its first delivery, to which it has Relation; (see titles *Deed III.* 7; *Escrow*;) and so things relating to a time long before, shall be as if they were done at that time. *Terms de Ley: Shep. Epit.* 837.

This device is most commonly to help acts in Law, and make a thing take effect: and shall relate to the same thing, the same intent, and between the same parties only; and it shall never do a wrong, or lay a charge upon a person that is no party. *Co. Litt.* 190: 1 *Rep.* 99: *Plowd.* 188: 2 *Vent.* 200.

When execution of a thing is done, it hath Relation to the thing executory, and makes all but one act to record, although performed at several times. 1 *Rep.* 199. See title *Execution: Judgment*, &c.

Sale of goods of a bankrupt, by Commissioners, shall have Relation to the first act of bankruptcy; and be good, notwithstanding the bankrupt sells them afterwards. *Stat.* 1 Jac. 1. c. 15. See title *Bankrupt*.

If an infant or feme covert disagree to a feoffment to them made, when they are of age, or discover; it shall relate as to this purpose,

to discharge them of damages from the time. 3 *Repl.* 29: *Co. Litt.* 310. See *Infant*, &c.

Letters of administration relate to the death of the intestate, and not to the time when they were granted. *Style* 341. See title *Executor*. When the wife is endowed of lands by the heir, she shall be in immediately from the husband by Relation. 36 *H.* 6, 7. See *Dower*.

It is a rule in pleadings, grants, &c. *ad proximum antecedens fiat relatio*; but that rule has an exception, (*viz.*) *nisi impediatur sententia*: And it hath been held, that this rule hath many restrictions, i. e. *Fiat relatio*, so as there is no absurdity or incongruity; therefore it is always *secundum subjectam materiam*. *Hard.* 77: 3 *Salk.* 199.

RELATOR, *Lat.*] A rehearser, or teller; applied to an informer. See titles *Information*; *Quo Warranto*.

RELAXATION; Release. See that title.

RELEASE.

RELAXATIO.] An instrument whereby estates, or other things, are extinguished, transferred, abridged, or enlarged. *West. Symbol.* part 1. l. 2. § 509. And whereby a man quits, and renounces, that which he before had. *Com. Dig.* title *Release*.

A RELEASE OF LAND, is classed by *Blackstone* among the secondary or derivative sort of Conveyances: and is by him defined to be, A Discharge or Conveyance of a man's right in lands or tenements, to another that hath some former estate, in possession. See further this *Dict.* titles *Conveyance*; *Deed*; *Lease and Release*.

The words generally used in such Releases are, *remised, released, and for ever quit claimed*. See *post.* II.

I. *Of Releases, generally.*

II. *Of the Words and Ceremony required in a Release; and how far a Covenant, Agreement, or a Disposition by Will, may operate as a Release.*

III. *What shall be released, by a Release of all Claims and Demands.*

IV. *What shall be released, by a Release of all Actions and Suits; and of all Right and Title in Land.*

V. *How far a Possibility, or contingent Interest, or Demand, may be released.*

I. THERE is a Release in Fact, and a Release in Law. *Perkins' Grants* 71. A Release in Fact, is that which the very words expressly declare. A release in Law, is that which doth acquit by way of consequence or intendment of Law. How these are available, and how not, see *Littleton* at large, l. 3. c. 8. *Cowell*.

A Release is the giving or discharging of a right of action which a man hath claimed, or may claim, against another, or that which is his; or it is the conveyance of a man's interest or right which he hath to a thing, to another who hath possession thereof, or some estate therein. 4 *New Abr.*

According to *Coke*, Releases are distinguished into *express Releases* in Deed, and those arising by operation of Law; and are made of lands and tenements, goods and chattels; or of actions real, personal, and mixt. 1 *Inst.* 264, a.

Releases of Land, may enure or take effect in various ways: Either, *First*, by way of *enlarging an estate*; (*enlarger l'estate*;) where the possession and inheritance are separated for a particular time; and he who hath the reversion or inheritance, releases to the tenant in

possession all his right and interest. Such Release is said to enlarge his estate; and to be equal to an entry and feoffment, and to amount to a grant and attornment. 1 *Inst.* 267, *n.* Thus, if there be tenant for life or years, remainder to another in fee, and he in remainder releases all his right to the particular tenant and his heirs; this gives him the estate in fee. *Litt.* § 465. But in this case the Relessee must be in *possession* of some estate, for the Release to work upon; for if there be a Lessee for years, and before he enters and is in possession, the Lessor releases to him all his right in the reversion, such Release is void, for want of possession in the Relessee. *Litt.* § 459.

When it is said, however, that a Release, which enures by enlargement, cannot work without a possession, it must be understood to mean, not that an actual estate in possession is necessary, but that a *vested interest* suffices for such a Release to operate upon. By comparing this with the operation of a *Lease and Release*, (see that title,) it will be seen, that not only estates in possession, but estates in remainder and reversion, and all other incorporeal hereditaments, may be effectually granted and conveyed by Lease and Release: but it is an inaccuracy to say, that the Release, in these cases, is in the *actual possession* of the hereditaments: the right expression is, that they are *actually vested* in him, by virtue of the Lease of possession and the statute. 1 *Inst.* 270 (a) *n.* 3.

To make Releases operate by enlargement, it is generally necessary, that the Relessee, at the time the Release is made, should be in actual possession of, or have a vested interest in, the lands intended to be released; that there should be a privity between him and the Relessor; and that the possession of the Relessee should be notorious. To this latter circumstance, however, the Statute of Uses furnishes an exception, exemplified in the operation of a Lease and Release: where the Bargainee has a vested interest, immediately after the execution of the bargain and sale, without any entry, attornment, or other act of notoriety whatsoever: though, at Common Law, till entry or attornment, the Lessee was not capable of a Release. But, from the general principles above noticed, tenant by *elegit* or *statute merchant* is not capable of a Release that is to operate by enlargement; while tenants in dower, or by the curtesy, *are*; as they have the notoriety of possession and privity of estate with respect to the Relessor. See 1 *Inst.* 273. (a) *in n.*

Secondly; By way of *passing an estate*; (*mitter l'estate*;) as when one of two coparceners releaseth all her right to the other, this passeth the fee-simple of the whole. 1 *Inst.* 273.

In both these cases there must be a privity of estate between the Relessor and Relessee; that is, one of their estates must be so related to the other, as to make but one and the same estate in Law. 1 *Inst.* 272, 3: 2 *Comm. c.* 20.

3dly; By way of *passing a right*; (*mitter le droit*;) as if a man be disseised, and releaseth to his disseisor all his right; hereby the disseisor acquires a new right, which changes the quality of his estate, and renders that lawful which before was tortious or wrongful. *Litt.* § 466.

Releases of this kind must be made either to the disseisor, his feoffee, or his heir. In all these cases, the possession is in the Relessee; the right in the Relessor; and the uniting the right to the possession, completes the title of the Relessee: But the different degrees of title in the disseisor, his feoffee, or his heir, give the Re-

leases made to them different operations. They all agree in this respect, that no privity is required, or indeed can from the nature of the case, exist between them and the Relessor. 1 *Inst.* 274. (a) *in n.*

At Common Law, lands could not be transferred from one to another, but by feoffment with livery of the seisin. This produced a notoriety of the transmutation of the possession. This notoriety was, in some measure, affected by a disseisin; but that was only a tortious possession, liable to be defeated by the disseisee. Thus the disseisor had the possession, the disseisee the right. To complete the title of the disseisor, it was necessary he should acquire the right: This could not be done by a feoffment, as that was a transfer of the possession; but it was effected by a Release, which, in this case, operated as an actual transfer of the right. 1 *Inst.* 264. (a) *in n.*

Thus, in the case of a Release, *per mitter le droit*, when made to the feoffee of the disseisor; the feoffee is in by title, his estate cannot be divested or disaffirmed, but by an act equal to that which created it: A Release does not affect his possession or title, but discharges it from the right of the Relessor; so that, whether the whole fee is in the feoffee, or carved out into particular estates, it remains unaltered by the Release, except as it is discharged by it from the right of the Relessor. 1 *Inst.* 275. (a) *in n.*—In the case of a release to the heir of the disseisor, it is to be observed, that a disseisor has a mere naked possession, unsupported by any right; and that the disseisee may restore his possession, and put a total end to the possession of the disseisor by entry. But though the feoffee of the disseisor comes in by title, still the right of possession remains in the disseisee, and he may equally enter on the feoffee as on the disseisor; so that a Release, *per mitter le droit*, gives both to the disseisor and his feoffee the right of possession, and the right of property: But if the disseisor dies, the entry of the disseisee is taken away, and a presumptive right of possession is in the heir; so that the Release of the disseisee only passes the right of property. 1 *Inst.* 277. (a) *in n.*

4thly; By way of extinguishment; as if my tenant for life makes a lease to *A.* for life, remainder to *B.* and his heirs, and I release to *A.*: this extinguishes my right to the reversion, and shall enure to the advantage of *B.*'s remainder as well as of *A.*'s particular estate. *Litt.* § 470. See title *Extinguishment*. Where the Relessee cannot have the thing *per mitter le droit*, yet the Release shall enure, by way of extinguishment, against all manner of persons; as when the lord grants the seigniorship to his tenant, such Releases absolutely extinguish the rent, &c. although the Relessee be only tenant for life. See 1 *Inst.* 267. (a) *in n.*: 193. (b): 273 (b).

5thly; By way of entry and feoffment; as if there be two joint disseisors, and the disseisee releases to one of them, he shall be sole seised, and shall keep out his former companion; which is the same in effect as if the disseisee had entered, and thereby put an end to the disseisin, and afterwards had enfeoffed one of the disseisors in fee. 1 *Inst.* 278. It has been already observed, that when a man has in himself the possession of lands, he must, at the Common Law, convey the freehold by feoffment and livery; which makes a notoriety in the country: but if a man has only a right or a future interest, he may convey that right or interest by a mere Release, to him that is in possession of the land: for the occupancy of the Relessee is considered as a matter of sufficient notoriety already. 2 *Comm.* c. 20; and see 1 *Inst.* 275. (b) *in n.*

A Release is to be adapted to the nature of the case, and the purposes for which the Release is intended; so that if a man be disseised of lands, or dispossessed of goods, and release all actions, he may, notwithstanding, enter into his lands, or retake his goods, the right and property being still in him, though he has divested himself of his remedy. *Hob.* 163: 4 *Co.* 63.

So, where a man has divers means to come to his right, he may release one, and yet take advantage of the other; but if a man has not any means to come to his right but by way of action, there, by a Release of all actions, his right by judgment of Law is gone, because by his own act he has barred himself of all means to come at it. 8 *Co.* 152: *Co. Litt.* 286.

Heretofore, Releases were construed with much nicety and great strictness; and, being considered as the deed or grant of the party, were, according to the rule of Law, taken strongest against the Releasor: They now receive such interpretation as these grants and agreements do, and are favoured by the Judges as tending to repose and quietness. *Dyer* 56: *Plowd.* 289: *Hell.* 15: 8 *Co.* 148.

Hence it hath been established as a general rule in the construction of Releases, that where there are general words only in a Release, they shall be taken most strongly against the Releasor; but where there is a particular recital in a deed, and then general words follow, the general words shall be qualified by the special words. 1 *Mod.* 99: 1 *Ld. Raym.* 235.

It is necessary, in all cases where a Release of lands is made, that the estate be turned to a right; as in a disseisin, &c. where there are two rights, a right of possession in the disseisor, and a right to the estate in the disseisee; now when the disseisee hath released to the disseisor, here the disseisor hath both the rights in him, *viz.* The right to the estate, and also to the possession: or else it is requisite that there be privity of estate between the tenant in possession and the Releasor; for a Release will not operate without privity. 2 *Lil.* 435. A Release, made by one that at the time of the making thereof had no right, is void; and a Release made to one that at the time of making thereof hath nothing in the lands, is also void, because he ought to have a freehold, or possession, or privity. *Noy's Max.* 74.

He that makes a Release must have an estate in himself, out of which the estate may be derived to the Relessee; the Relessee is to have an estate in possession in deed, or in Law, in the land whereof the Release is made, as a foundation for the release; there must be privity of estate between the Relessor and Relessee, and sufficient words in Law, not only to make the Release, but also to create and raise a new estate, or the Release will not be good. 1 *Inst.* 22. A Release to a man and his heirs will pass a fee-simple; and if made to a man, and the heirs of his body, by this the Relessee hath an estate tail: But a Release of a man's right in fee-simple, is not sufficient to pass a fee-simple. 1 *Inst.* 273.

A Release made by deed-poll, of right to lands, &c. needs no other execution than sealing and delivery; and will operate without consideration: But it is convenient to put a valuable consideration therein; lest it should be judged fraudulent by statute. *Litt.* § 445. *Lil. Convey.* 230. 248: *Cro. Jac.* 270. See title *Consideration*.

II. A RELEASE which operates by *mitter l'estate* is, where two persons come in by the same feudal contract, as joint-tenants or coparceners, and one of them releases to the other the benefit of it. In releases which operate by this mode, the Relessee being supposed to be already seised of the inheritance, by virtue of the former feudal contract, and the Release only operating as a discharge from the right of pretensions of another, seised under the same contract, *words of inheritance*, in the Release, are useless. So, in cases of Releases *per mitter le droit*, words of inheritance are not necessary; as the disseisor, to whom or to whose feoffee or heir that Release is made, (see *ante* l.) acquires the fee by the disseisin, and therefore cannot take it under the Release: But where the Release operates by enlargement, the Relessee having no such previous inheritance, and possession being either for life or in fee, (as originally granted,) the Release gives the estate to the Relessee for his life only, unless it is expressly made to him and his heirs. 1 *Inst.* 273, (b); 274, (a), *in n.*

Littleton says, that the proper words of a Release are *remisise, relaxasse, & quietum clamasse*, which have all the same signification. Lord Coke adds, *Renunciare, acquietare*; and says, that there are other words which will amount to a Release; as if the Lessor grants to the Lessee for life, that he shall be discharged of the rent; this is a good Release. *Lit.* § 445: 1 *Inst.* 264: *Plowd.* 140.

So, a pardon, by act of Parliament, of all debts and judgments, amounts to a Release of the debt; the word Pardon including a Release. 1 *Sid.* 261.

An express Release must regularly be in writing and by deed, according to the common rule, *eodem modo oritur, eodem modo dissolvitur*; so that a duty arising by record must be discharged by matter of as high a nature; so of a bond or other deed. *Co. Litt.* 264, b: 1 *Roll. Rep.* 43: 2 *Leon.* 76. 213: 2 *Roll. Abr.* 408: 2 *Sand.* 48: *Moor* 573. *pl.* 787.

But a promise by words may, before breach, be discharged or released, by word of mouth only. 1 *Sid.* 177: 2 *Sid.* 78: *Cro. Jac.* 483. 620: *Vide Cro. Car.* 383: 1 *Mod.* 262: 2 *Mod.* 259: 1 *Sid.* 293.

A Release of a right in chattels cannot be without deed. 1 *Leon.* 283.

A Covenant perpetual, as that the Covenantor will not sue beyond a certain limitation of time, is a Defeasance, or absolute Release; and this construction has been made to avoid circuitry of action; for if in such case the party should, contrary to his covenant, sue, the other party would recover precisely the same damages which he sustained by the other's suing; but if the covenant be, that he will not sue *till* such a time, this does not amount to a Release, nor is it pleadable in bar as such, but the party hath remedy only on his covenant. *Moor* 23. *pl.* 80. 811: 1 *Roll. Abr.* 939: *Bridg.* 118: 2 *Bulst.* 95. 290: *Hard.* 113: 3 *Lev.* 41: 2 *Salk.* 573. 5: *Carth.* 210: 1 *Ld. Raym.* 419. 691: See *Cro. Eliz.* 352: 1 *And.* 307: 1 *Roll. Abr.* 939: *Carth.* 63: *Salk.* 373: 1 *Show.* 46.

If two are jointly and severally bound in an obligation, and the obligee by deed, covenants, and agrees not to sue one of them; this is no Release, and he may notwithstanding sue the other. *Cro. Car.* 551: *March* 95: 2 *Salk.* 575.

But if two are jointly and severally bound, a Release to one dis-

charges the other. 1 *Ld. Raym.* 420. See 2 *Vent.* 217: 1 *Ld. Raym.* 691: 1 *Lev.* 152: and further, this Dict. titles *Bond*; *Covenant*; *Agreement*.

It seems agreed, that a will, though sealed and delivered, cannot amount to a Release, because it is ambulatory and revocable during the testator's life; and by reason of the executor's consent, requisite to every disposition of a personal thing by will, and the injury that might accrue to the testator's creditors, were a will allowed to operate as a Release. *Stil.* 286: 1 *Vent.* 39.

Therefore, where in debt on an obligation, by the representative of a testator, a defendant pleaded that the testator by his last will in writing released to the defendant; this was adjudged ill, and that no advantage could be taken by plea. 1 *Sid.* 421.

But it hath been held in equity, that though a will cannot enure as a Release, yet provided it were expressed to be the intention of the testator that the debt should be discharged, the will would operate accordingly; and that in such case it would be plainly an absolute discharge of the debt, though the testator had survived the legatee. 1 *P. Wms.* 85: 2 *Vern.* 521.

So, in another case, it was held, that a Release by will can only operate as a legacy, and must be assets to pay the testator's debts; and if a debt so released by will be afterwards received by the testator himself in his lifetime, the legacy is extinct; and such Release by will intimates no more than that the executors should not, after the testator's death, trouble or molest the debtor. 2 *P. Wms.* 332.

If a debt is mentioned to be devised to the debtor, without words of Release or discharge of the debt, and the debtor die before the testator; this will not operate as a Release, but will be considered as a lapsed legacy, and the debt will subsist. 2 *Vern.* 522.

A debt is only a right to recover the amount of the debt by way of action: and as an executor cannot maintain an action against himself, or against a co-executor, the testator by appointing the debtor an executor of his will, discharges the action, and consequently discharges the debt. Still, however, when the creditor makes the debtor his executor, it is to be considered but as a specific bequest or legacy, devised to the debtor to pay the debt; and therefore, like other legacies, it is not to be paid or retained, till the debts are satisfied; and if there are not assets for the payment of the debts, the executor is answerable for it to the creditors. In this case, it is the same whether the executor accepts or refuses the executorship. On the other hand, if the debtor makes the creditor his executor, and the creditor accepts the executorship if there are assets, he may retain his debt out of the assets, against the creditors in equal degree with himself; but if there are not assets he may sue the heir, where the heir is bound. 1 *Inst.* 264, (b) *in n.* See this Dictionary, titles *Executor*; *Legacy*; *Will*.

In the case of *Smith v. Stafford* (*Hob.* 216.), the husband promised the wife, before marriage, that he would leave her worth 100*l.* The marriage took effect, and the question was, whether the marriage was a Release of the promise: All the Judges but *Hobart* were of opinion, that as the action could not arise during the marriage, the marriage could not be a Release of it. The doctrine of this case was admitted in that of *Gage v. Acton*; which arose upon a bond executed by the husband to the wife, before marriage, with a condition making it void if she survived him, and he left her 1000*l.* Two of the Judges were

of opinion that the debt was only suspended, as it was on a contingency which could not, by any possibility, happen during the marriage. But *Holt*, Chief Justice differed from them; he admitted, that a covenant or promise by the husband to the wife, to leave her so much in case she survives him, is good; because it is only a future debt on a contingency, which cannot happen during the marriage, and that is precedent to the debt: but that a bond debt was a present debt, and the condition was not precedent, but subsequent; that made it a present duty, and the marriage was consequently a Release of it. The case afterwards went into Chancery. The bond was taken there to be the agreement of the parties, and relief accordingly decreed. See 1 *Salk.* 325: 12 *Mod.* 290: 2 *Vern.* 481. A like decree was made in the case of *Camel v. Buckle*, 2 *P. Wms.* 243. See further, this Dictionary, title *Baron and Feme*.

III. *LITTLETON* says, that a Release of all Demands is the best Release to him to whom it is made; and *Coke* says, that the word Demand is the largest word in Law, except Claim; and that a Release of all Demands discharges all sorts of actions, rights and titles, conditions before or after breach, executions, appeals, rents of all kinds, covenants, annuities, contracts, recognizances, statutes, commons, &c. *Litt.* § 508: *Co. Litt.* 291.

But notwithstanding the large import of the word Demands, yet there are several instances where the generality of the word hath been restrained to the particular occasion for which the Release was made.

By a Release of all Demands, all actions real, personal, and mixed, and all actions of appeal, are extinct. *Litt.* § 509: 8 *Co.* 154.

So a Release of all Demands extends to inheritances, and takes away rights of entry, seizures, &c. *Co. Litt.* 291. But if the King releaseth all Demands, yet as to him the inheritance shall not be included. *Bro. Prerogative*, pl. 62: *Bridge.* 124.

By a Release of all Demands made to the tenant of the land, a common of pasture shall be extinct. *Co. Litt.* 291.

A Release of all Demands will bar a demand of a relief, because the relief is by reason of the seigniorship to which it belongs. *Cro. Jac.* 170.

If *A.* being possessed of goods loses them, and they come to the hands of *B.* who being in possession, *A.* by deed releases to *B.* all actions and demands personal which at any time before *habuit vel habere potuit* against *B.* for any cause, matter, or thing whatsoever; this shall bar *A.* of the property of the goods; so that *B.* has the absolute right in him by this Release. 2 *Roll. Abr.* 407.

By a Release of all Demands, all manner of executions are gone, for the Recoveror cannot sue out a *fieri facias*, *capias*, or *elegit*, without a demand. *Litt.* § 508: 2 *Roll. Abr.* 407.

By a Release of all Demands to the conusor of a statute-merchant, before the day of payment, the conusee shall be barred of his action, because the duty is always in demand; yet if he releases all his right in the land, it is no bar. *Co. Lit.* 291: *Bridgm.* 124.

So, a bond conditioned to pay money at a day to come, is a debt and duty presently, and may be discharged by a Release of all actions and demands before the day of payment. *Cro. Jac.* 300.

But in an action of debt for non-performance of an award made for

payment of money at a day to come; there is no present debt, nor any duty before the day of payment is come, therefore it cannot be discharged before the day, by a Release of all actions and demands. *Yelv.* 214: *Cro. Jac.* 300.

So, if a man devises a legacy of 20*l.* to *J. S.* at the age of 23; though the legatee, after he attains the age of 21, and before the day of payment, may release it, yet by the word Demands, it is not released, but there must be special words for the purpose. 10 *Co.* 51.

A Release of all Demands does not discharge a covenant not broken at the time; but a Release of all Covenants will release the Covenant. *Cro. Jac.* 173: 2 *Roll. Abr.* 407: *Noy* 123. For the difference, when broken or not, see *Dyer* 217: *Litt. Rep.* 86: 3 *Leon.* 69: 5 *Co.* 71: *Hoe's case*: 10 *Co.* 51: *Co. Litt.* 292: 8 *Co.* 153: 1 *And.* 8. 64: and this Dictionary, title *Covenant*.

If a Lessee for life grants over his estate by indenture, reserving rent during the continuance of the estate, and afterwards releases to the assignee all demands; this shall discharge the rent, for he had the freehold of the rent in him at the time. 2 *Roll. Abr.* 408: *Cro. Jac.* 486: *Bridgm.* 123: 2 *Roll. Rep.* 20: *Poph.* 136.

So, if Lessee for years grants over by indenture all his estate, reserving a rent during the term, and afterwards releases to the assignee all demands, this shall release the rent; for though he cannot have an action to demand all the estate, yet this is an estate in him of the rent, and assignable over; and in an action of debt for any arrears after, he shall claim it as a duty accrued from the estate; and it shall not be said that the duty arises annually on taking the profits, but this had its commencement and creation by the reservation of the contract, which was before. 2 *Roll. Abr.* 408.

If there be Lessee for years rendering rent, and the Lessor grants over the reversion, and the Lessee attorns, and after the Lessee assigns over his estate, and after, the Assignee of the reversion releases all demands to the first Lessee, yet this shall not release the rent; for there is neither privity of the estate or contract between them after the assignment; but if the Release had been made to the Assignee, it had extinguished the rent. 2 *Roll. Abr.* 408: *Moor* 544: *Cro. Eliz.* 606.

If he who has a rent-charge in fee releases to the tenant of the land all demands from the beginning of the world till the making of the deed of Release; this shall discharge all the rent, as well that to come as what is past. 20 *Ass. pl.* 5: 2 *Roll. Abr.* 408.

It is said by *Littleton* and *Coke*, that by a Release of all demands a rent-service shall be released; but this it is said is to be intended of a rent-service in gross, as a seignory. *Litt.* § 510. *Co. Litt.* 291. Therefore, where in action of covenant on a lease for years, to pay the rent reserved, the defendant pleaded Release by the plaintiff of all demands, at a day before the rent in question became due; the plaintiff replied, that the Release was in performance of an award of all matters in controversy between the plaintiff and defendant; and on demurrer it was adjudged, that the rent was not discharged by this Release; as it became due by the perception of the profits, and was not like to a rent-charge, or a rent-parcel of a seignory; and that this rent being incident to the reversion, and part thereof, was no more released than the reversion itself; and this construction should the rather prevail, as it was not the intention of the party to release this

rent; but *Twisden* said, that in Releases and Deeds, when words are heaped up, the party who is to take advantage may take the strongest word, and the strongest sense, and that is the reason they are put in; and as to the intent, that must be gathered from the words, and men must take care what words they use: And he said, he could see no difference between this rent, and a rent in fee, both are rent-services, and neither demandable before they come due, otherwise than as in 40 *Ed.* 3. 47. it is said, there is a continual demand betwixt lord and tenant; and in this case there is a Tenure between the Lessee and him in reversion; and the reason why the reversion is not touched by this Release is, because it can work only by way of extinguishment, and not by way of passing an interest; but it was adjudged against the Release. 1 *Lev.* 99, 100: 1 *Sid.* 141: 1 *Keb.* 499. 510: See 2 *Salk.* 578.

IV. A RELEASE of all actions discharges a bond to pay money on a day to come; for it is *debitum in presenti, quamvis sit solvendum in futuro*; and it is a thing merely in action, and the right of action is in him who releases, though no action will lie when the Release is made. *Co. Litt.* 292. See title *Bond*.

But a Release of Actions does not discharge a *rent* before the day of payment, for it is neither *debitum* nor *solvendum* at the time of the Release; nor is it merely a thing in action, for it is grantable over. *Co. Litt.* 292.

So, if a man has an annuity for a term of years, for life, or in fee, and he, before it be in arrear, releases all Actions; this shall not release the annuity, for it is not merely in action, because it may be granted over. *Co. Litt.* 292: 1 *Bulst.* 178: *Cro. Eliz.* 897: *Moor* 113. But such Release shall release the arrears incurred before. 39 *H.* 6. 43: 2 *Roll. Abr.* 404.

By a Release of all manner of Actions, all Actions, as well criminal as real, personal, and mixed, are released. *Co. Litt.* 287.

A Release of Actions real is a good bar in actions mixed: as Assise of novel disseisin, Waste, *Quare impedit*, Annuity; and so is a Release of Actions personal. *Co. Litt.* 284. But not after the grantee has made his election. 1 *Jones* 215.

In an appeal of robbery or felony, a Release of all Actions personal will not bar; because an appeal, in which the appellee is to have judgment of death, is higher than a personal action: but a Release of all manner of Actions, or of all Actions criminal, or of all Actions mortal, or of all Actions concerning the Pleas of the Crown, or of all Appeals, or of all Demands, will be a good bar of any such appeal. *Co. Litt.* 287.

And in appeal of maihem a Release of all actions personal may be pleaded, because damages only are recovered. *Co. Litt.* 288.

A Release of all Actions is regularly no bar to an execution; for execution is no action, but begins when the action ends. *Co. Litt.* 289: 8 *Co.* 153.

Also a Release of all Actions does not regularly release a Writ of Error; for it is no action, but a commission to the Justices to examine the record; but if therein the plaintiff may recover, or be restored to any thing, it may be released by the name of Action. 2 *Inst.* 40: *Yelv.* 209: *Co. Litt.* 288. But, by a Release of all Suits, a man is barred of a Writ of Error. *Latch.* 110. So, by a Release of all Suits a man is barred of *execution*, because it cannot be had without appli-

cation to the Court, and prayer of the party, which is his suit. *Co. Litt.* 291: 8 *Co.* 153.

A Release of all Actions is a good bar to a *scire facias*, though it be a judicial writ, for the defendant may plead to it, and it is in nature of a new original given by the statute. *Co. Litt.* 290: *Comb.* 455.

So, in *replevin*, a Release of all Actions is a good bar, for the avowant is defendant, though in some respects he is plaintiff. 2 *Rol. Rep.* 75.

So, if a man by wrong takes away my goods; if I release to him all Actions personal, yet by Law I may take the goods out of his possession. *Co. Litt.* 286: *Skin.* 57.

If a man releases all Actions, by this he shall release as well Actions which he hath as executor, as those in his own right. 39 *Ed.* 3. 26: 2 *Roll. Abr.* 404: 2 *Ld. Raym.* 1307. *S. C.* cited by *Porvel*; and said by him to be clearly so, unless there was an Action of his own for the Release to work upon.

If a man releases *all quarrels*; a man's deed being taken most strongly against himself, it is as beneficial as all Actions, for by it all Actions real, personal, and mixed, are released; and all causes of Action, though no Action then depending. *Co. Litt.* 292.

If a person release to another all his right which he hath in the land, without using any more words, as, *To hold to him and his heirs*, &c. the Relessee hath only an estate for life. *Dyer* 263. A Release made to a tenant in tail, or for life, of right to land, shall extend to him in remainder or reversion. 1 *Inst.* 267. By Release of all a man's right unto lands, all actions, entries, titles of dower, rents, &c. are discharged; though it bars not a right that shall descend afterwards: And a Release of all right in such land will not discharge a judgment not executed; because such judgment doth not vest any right: but only makes the land liable to execution. 8 *Rep.* 151: 3 *Salk.* 298.

It is said a Release of all one's title to lands, is a Release of all one's right. *Litt.* § 509: 1 *Inst.* 292. By a Release of all entries, or right of entry, which a man hath into lands, without more words, the Relessor is barred of all right or power of entry into those lands; and yet if a man have a double remedy, *viz.* a right of entry, and an action to recover, and then release all entries, by this he is not barred and excluded his action; nor doth a Release of Actions bar the right of entry. *Plowd.* 484: 1 *Inst.* 345.

If a disseisee releases to the disseisor all Actions; this is no Release of his right of entry; for when a man has several means to come at his right, he may release one, and yet take benefit of the other. *Co. Litt.* 28. b: 8 *Co.* 141.

V. To prevent maintenance, and the multiplying of contentions and suits, it was an established maxim of the Common Law, that no possibility, right, title, or any other thing that was not in possession, could be granted or assigned to strangers: A right in action could not be transferred even by act of law; nor was it considered as transferred to the King by the general transferring words of an Act of Attainder. See 3 *Rep.* 2, b. But a right or title to the freehold or inheritance of lands might be released in five manners. 1. To the tenant of the freehold, in fact, or in Law, without any privity. 2. To him in Remainder. 3. To him in reversion. 4. To him who had right only, in respect of privity; as if the tenant were disseised, the lord, notwithstanding the disseisin, might release his services to him.

5. To him who had privity only, and not the right; as, if tenant in tail made a feoffment in fee, after this feoffment, no right remained in him; yet in respect of the privity only, the donor might release to him the rent and services. So, 6. If the terretenants, and the person entitled to the right or possibility, joined in a grant of the lands, it would pass them to the grantee, discharged from the right or possibility. See 10 *Rep.* 49, (b.) But the law is now altered, in the above instances, in many respects. As to the assignment of things in action, see title *Assignment*. A contingent remainder in real estates can only be transferred by a fine and a common recovery, in which the remainder-man comes in upon the voucher. See titles *Recovery*; *Remainder*.

On the principles of the Common Law above stated, it was held, that an heir at law cannot release to his father's disseisor in the life time of the father; for the heirship of the heir is a contingent thing, for he may die in the lifetime of the father, or the father may alien the lands. *Litt.* § 446: *Co. Litt.* 265, a: 10 *Co.* 51: *Bridgm.* 76.

So, if the conusee of a statute released to the conusor all his right to the land, yet he might afterwards sue execution, for he had no right to the land, but only a possibility. 1 *And.* 133: *Co. Litt.* 265: 9 *Roll. Abr.* 405: *Cro. Eliz.* 552.

So, if a creditor release to his debtor all the right and title which he hath to his lands, and afterwards get judgment against him, he may extend a moiety of the same land; for he had no right to the land at the time of the Release, and the land is not bound but in respect to the person. 2 *Mod.* 281: 2 *Lev.* 215.

So, if a plaintiff releases all demands to the bail in the King's Bench and afterwards judgment be given against the principal, execution may be sued against the bail; for that, at the time of the Release, there was only a possibility of the bail becoming chargeable. 5 *Co.* 70: *Co. Lit.* 265: *Moor* 469: *Cro. Eliz.* 579: *Hut.* 17: and see *Moor* 852.

So, if *A.* recovers in trespass against *B.* in *B. R.*, and *B.* brings a writ of error, pending which *A.* releases to *B.* all executions, and afterwards the judgment is affirmed, and new damages given to *A.* for the delay, (on *stat.* 3 *H. 7. c.* 10.) this Release shall not bar *A.* to have execution of those damages, because he had not any right to have execution, nor to any duty when the Release was made. 2 *Roll. Abr.* 404: *Cro. Jac.* 337: 1 *Roll. Rep.* 11.

If the next presentation to a church be granted to *A.* and *B.* and living the incumbent, *A.* releases all his estate, title, and interest to *B.*, this Release is void, it being of a chose in action; otherwise, had the Release been made after the avoidance, at which time the interest would have been vested in *A.* *Cro. Eliz.* 173. 600. *Owen* 85: 1 *Leon.* 167: 3 *Leon.* 256: *Dyer* 244: 10 *Co.* 48.

A city orphan cannot at law release her orphanage part to her father, for she hath no right in her during the life of her father: but it hath been held in equity, that such Release being for a valuable consideration, as on the marriage of a daughter, and a portion given her by the father, such Release may operate as an agreement to waive the orphanage, and hath accordingly been so decreed in equity. 1 *P. Wms.* 638: 2 *P. Wms.* 527: *Preced. Chan.* 545.

If there be a devise of a term for years to *A.* for life, remainder to *B.*, *B.* may release his right to *A.*, and such Release shall extin-

guish his interest, though it was objected that *B.* had only a possibility at the time of the Release made. 10 *Co.* 47.

A duty uncertain at first, which, on a condition precedent, is to be made certain afterwards, is but a possibility which cannot be released. 5 *Co.* 702; 2 *Mod.* 281. As a *nomine pene* waiting on a rent, which cannot be released till the rent is behind, as the non-payment of the rent makes the *nomine pene* a duty. *Yelv.* 215; *Brownl.* 116. So, if a man covenant to pay 10*l.* on the birth of a child, the covenantor cannot be released of the 10*l.*; it resting merely in contingency whether such child ever will be born or not. *Yelv.* 192.

So, if an award be, that on a plaintiff's delivering to defendant, *by a certain day*, a load of hay, defendant shall pay him 10*l.*; in this case the 10*l.* cannot be released *before the day*, for it rests merely in possibility and contingency, whether the money shall ever be paid, for it becomes a duty on delivery of the hay *only*, and not before. *Yelv.* 215. See title *Award*.

In debt on bond against the defendant as administrator, &c. the defendant pleaded a Release; whereby the plaintiff, reciting that there were several controversies between the defendant and him, about a legacy and the right of administration, releases to the defendant all his right, title, interest, and demand of, in, and to the personal estate of the intestate; and, on demurrer, this was held to be no plea; and a difference was taken by *Holt*, between a Release of all Demands to the person of the obligor or administrator, and a Release of all Demands to the personal estate of the obligor or intestate; that the last will not discharge the bond, as the other may, because the bond does not give any right or demand upon the personal estate, &c. until judgment and execution sued. *Salk.* 575; 2 *Ld. Raym.* 786.

If *A.* promises *B.* in consideration that he will sell to his son certain merchandise, at such a price, that if his son does not pay it at the feast of St. *Michael* next ensuing, he himself will pay it; and before *Michaelmas*, *A.* releases all actions and demands to him who made the promise, this shall not release the *assumpsit*: For till *Michaelmas* it cannot be known whether his son will have paid it or not, and, till default by him, the other is not bound to pay it; so it is a mere contingency till *Michaelmas*, which cannot be released. 2 *Roll. Abr.* 407, 8.

A. the mother of *B.* having entered into a bond on his behalf for 1000*l.*, *B.* executed an Indemnity Bond of the same date, conditioned for the payment of 1000*l.*, three months after her decease. *A.* afterwards made a Codicil to her Will, by which she relinquished two debts due from *B.* of 1000*l.* and 500*l.*; and desired him to be punctual in indemnifying her estate against the bond for 1000*l.* Soon after the execution of this Codicil, *A.* executed a Release to *B.*, in which (reciting the existence of certain debts of 500*l.* 480*l.* and 300*l.* due on bonds, &c.) it was expressed that she had agreed to release *B.* from those sums, and of and from all and every other sum or sums of money, claims and demands thereby secured, and all other sum and sums of money, claim and demand whatsoever, and released him accordingly from those sums, and all claim on account of those sums, or for, or on account of any other matter, cause, or thing whatsoever; the Court of *C. P.* held that this Release did not extend to the Indemnity Bond: and that no extrinsic evidence could be admitted to explain the intentions of *A.* as to the Release. 1 *New Rep. C. P.* 113.

For more learning on this subject, see 4 *New Abr.*: 18 *Vin. Abr.*: and *Com. Dig.* tit. *Release*.

RELEGATION, *Relegatio*.] A banishing, or sending away: *Abjuration* is forswearing the realm for ever; *Relegation* is banishment for a time only. *Co. Litt.* 133. See title *Transportation*.

RELEVANT, applying to the matter in question—so *Relevancy* of proof is the effect of it as applied to the action or Suit.

RELICTA VERIFICATIONE. Where a Judgment is confessed by *cognovit actionem* after plea pleaded, and the plea is withdrawn, it is called a Confession, or *Cognovit actionem relictâ verificatione*. See tit. *Judgments acknowledged*.

RELIEF, *Relevamen*; but in *Domesday*, *Relevatio*, *relevium*.] A certain sum of money which the tenant, holding by knights-service, grand serjeanty, or other tenure, (for which homage or legal service is due,) and being at full age at the death of his ancestor, paid unto his lord at his entrance. See *Bracton*, lib. 2. c. 36: *Britton*, c. 69: *Grand Custumary of Normandy*, c. 34.

Skene, de verbor. signif. verb. *Relevium*, saith, *Relief* is a French word, from the Latin *relevare*, to relieve, or take up that which is fallen; for it is given by the tenant or vassal, who is of perfect age, after the expiring of the wardship, to his superior lord, of whom he held his lands by knight-service, that is, by Ward and Relief: For, by payment thereof, he relieves, and, as it were, raiseth up again his lands, after they were fallen down into his superior's hands, by reason of wardship, &c.

Relief is otherwise thus explained, viz. A feudatory or beneficiary estate in lands was at first granted only for life; and after death of the vassal it returned to the chief lord, for which reason it was called *Feudum caducum*, viz. fallen to the lord by the death of the tenant; afterwards, these feudatory estates being turned into an inheritance, by the connivance and assent of the chief lord, when the possessor of such an estate died, it was called *Hæreditas caduca*, i. e. it was fallen to the chief lord; to whom the heir having paid a certain sum of money, he did then *relevare hæreditatem caducam* out of his hands; and the money thus paid was called a *Relief*.

This must be understood after the Conquest; for, in the time of the Saxons, there were no *Reliefs*, but *heriots* paid to the lord at the death of his tenant; which in those days were horses, arms, &c. and such tributes could not be exacted by the English immediately after the Conquest, for they were deprived of both by the Normans; and instead thereof, in many places, the payment of certain sums of money was substituted, which they called a *Relief*; and which continues to this day.

Relief reasonable, or, as it is sometimes called, *lawful* and *antient Relief*, is such as is enjoined by some law, or becomes due by custom, and doth not depend on the will of the lord. What that was, we may read in the Laws of William the Conqueror, c. 22. and of Henry I. c. 14; and, before that time, in the Laws of Canutus, c. 97; viz. The Relief of an Earl was eight war-horses, with their bridles and saddles, four *loricas*, four helmets, four shields, four pikes, four swords, four hunting-horses, and a palfrey, with their bridles and saddles: the Relief of a Baron or Thine was four horses, two with furniture, and two without, two swords, four lances, four shields and an helmet, cum *lorica*, and fifty marks in gold. The Relief of a Vavasor was his father's

horse, his helmet, shield, lance, and sword which he had at his death. The *Relief* of a Villein, or countryman, was his best beast, &c. *Cowell*. See title *Tenures*.

RELIGION, *Religio*.] Virtue is founded on reverence of God, and expectation of future rewards and punishments; a system of Divine Faith and Worship as opposed to others. *Johns*. That habit of reverence towards the Divine Nature, whereby we are enabled and inclined to serve and worship Him, after such a manner as we conceive most acceptable to Him, is called *Religion*. *Wilkins*.

All blasphemies against God, as denying his Being or Providence; all profane scoffing at the Holy Scripture, or exposing any part to contempt or ridicule; all impostures in Religion, as falsely pretending to extraordinary commissions from God, and terrifying or abusing the people with false denunciations of judgments, &c.; all *open lewdness*, and other scandalous offences of this nature, because they tend to subvert all religion or Morality, which are the foundation of Government, are punishable by the Temporal Judges with fine and imprisonment; and also such corporal infamous punishment as to the Court in discretion shall seem meet, according to the heinousness of the crime. 1 *Hawk. P. C. c. 5*.

Blackstone enumerates the following, as the crimes against God and Religion, which are punishable by the Laws of *England*. APOSTACY; as to which see this Dict. tit. *God and Religion*—HERESY; see this Dict. under that title—REVILING THE ORDINANCES of the Church; see that title—NONCONFORMITY; see titles *Dissenters*; *Nonconformists*; *Quakers*—POPERY; see tit. *Papists*—BLASPHEMY; SWEARING (profane); CONJURATION, or Witchcraft; see those titles—RELIGIOUS IMPOSTORS; see tit. *Prophecies*—SIMONY; DRUNKENNESS; see those titles—PROFANATION of the Lord's Day, see tit. *Sunday*—LEWDNESS; see that title:—See also titles *Service* and *Sacraments*; *Parson*; *Clergy*, &c.

Seditious words, in derogation of the established Religion, are indictable, as tending to a breach of the peace. 1 *Hawk. P. C. c. 5*. § 6. See titles *Church*; *Papists*; *Conformity*, &c.

RELIGIOUS HOUSES, *Religiosæ domus*.] Houses set apart for pious uses, such as *Monasteries*, *Churches*, *Hospitals*, and all other places where charity is extended to the relief of the Poor and Orphans, or for the use or exercise of Religion. See titles *Monasteries*; *Abbat*.

In the *Notitia Monastica*, or a *Short History of the Religious Houses in England and Wales*, by *Tanner*, in alphabetical order of counties, is accurately given a full account of the Founders, the time of foundation, titular saints, the order, the value, and the dissolution; with reference to printed authors, and manuscripts which preserve any memoirs relating to each House; with a Preface of the institution of religious orders. &c. *Cowell*.

RELIGIOUS MEN, *Religiosi*.] Such as entered into some monastery or convent, there to live devoutly: And in antient deeds of sale of land, the purchasers were often restrained by covenant from giving or alienating it, *viris religiosis*, to the end the land might not fall into mortmain. *Cowell*. See tit. *Mortmain*.

RELIGIOUS ORDERS, For the qualification of clergy. See title *Ordination*.

RELINQUISHMENT, A forsaking, abandoning, or giving over.

It hath been adjudged, that a person may *relinquish* an ill demand in a declaration, &c. and have judgment for that which is well demanded. *Style*, 175. See title *Damages*, II.

RELIGUES. *Reliquæ*.] Remains, such as the bones, &c. of Saints who are dead, preserved by persons living, with great veneration, as sacred memorials of them: They are forbidden to be used, or brought into *England*, by several statutes; and Justices of Peace were, by *stat. 3 Jac. 1. c. 26.* empowered to search houses for Popish books and Reliques, which, when found, are to be defaced and burnt, &c. See title *Papists*.

RELOCATION, A reletting or renewal of a lease. Where a landlord, instead of warning a tenant to remove, has allowed him to continue without making any new agreement, this is termed in the Law of *Scotland*, *tacit Relocation*.

REMAINDER.

REMANENTIA.] An estate limited in lands, tenements or rents, to be enjoyed after the expiration of another particular estate. And a Remainder may be either for a certain term, or in fee-simple, or fee-tail; *Broke*, title *Donee and Remainder*, 245: *Glanv. lib. 7. c. 1.* The difference between a Remainder and Reversion, according to *Spelman*, is this, That by a Reversion, after the appointed term, the estate returns to the donor, or his heirs, as the proper fountain; whereas by Remainder it goes to some third person, or a stranger. *Cowell*.

Remainder is described to be a remnant of an estate in lands or tenements, expectant on a particular estate created together with the same, and at the same time; and is so expectant on the particular estate, that unless it can take effect when the particular estate determines, it is void. *Co. Lit.* 49. 143: 2 *Co.* 51: *Moor*, 344: *Vaugh.* 269.

I. *Of the Nature of Remainders, vested or contingent; and the general Rules relating thereto.*

II. *Of Contingent Remainders; and Remainders in Abeyance.*

III. *Of Cross Remainders, and those arising by Implication and Construction of Law.*

IV. *Of what Things a Remainder may be made, or limited.*

V. *What Words are sufficient to create a Remainder; and herein, in what Cases the Heir shall take by Words of Purchase, or Words of Limitation, and the Effect thereof: And see this Dictionary, title Purchase.*

I. AN ESTATE in Remainder may be defined to be, an estate limited to take effect and be enjoyed after another estate is determined. As, if a man, seised in fee-simple, grant lands to *A.* for twenty years, and after the determination of the said term, then to *B.* and his heirs for ever: Here *A.* is tenant for years, Remainder to *B.* in fee. In the first place, an estate for years is created or carved out of the fee, and given to *A.*; and the residue or Remainder of it is given to *B.* But both these interests are in fact only one estate; the present term of years and the Remainder afterwards, when added together, being equal only to one estate in fee. *Co. Litt.* 143. They are indeed different parts, but they constitute only one whole: they are carved out of one and the same inheritance: they are both created, and may both subsist together; the one in possession, the other in expectancy. So,

if land be granted to *A.* for 20 years, and, after the determination of the said term, to *B.* for life; and after the determination of *B.*'s estate for life, it be limited to *C.* and his heirs for ever: This makes *A.* tenant for years, with *Remainder* to *B.* for life, *Remainder over* to *C.* in fee. Now, here the estate of inheritance undergoes a division into three portions: there is first *A.*'s estate for years carved out of it; and after that *B.*'s estate for life; and then the whole that remains is limited to *C.* and his heirs. And here also the first estate, and both the *Remainders*, for life, and in fee, are one estate only; being nothing but parts or portions of one entire inheritance; and if there were a hundred *Remainders*, it would still be the same thing; upon a principle grounded in mathematical truth, that all the parts are equal, and no more than equal, to the whole. And hence also, it is easy to collect, that no *Remainder* can be limited after the grant of an estate in fee-simple; because a fee-simple is the highest and largest estate that a subject is capable of enjoying; and he that is tenant in fee hath in him the *whole* of the estate: a *Remainder* therefore, which is only a portion, or residuary part, of the estate, cannot be reserved after the whole is disposed of. *Plowd.* 29: *Vaugh.* 269. A particular estate, with all the *Remainders* expectant thereon, is only one fee-simple; as 40*l.* is part of 100*l.*, and 60*l.* is the *Remainder* of it: wherefore, after a fee-simple once vested, there can no more be a *Remainder* limited thereon, than after the whole 100*l.* is appropriated there can be any residue subsisting. 2 *Com. c.* 11.

Thus much being premised, the Student will be the better enabled to comprehend the rules that are laid down by Law to be observed in the creation of *Remainders*; and the reasons upon which those rules are founded.

First, There must necessarily be some particular estate, precedent to the estate in *Remainder*. As an estate for years to *A.* *Remainder* to *B.* for life; or, an estate for life to *A.* *Remainder* to *B.* in tail. This precedent estate is called the *particular* estate, as being only a small part, *particula*, of the inheritance; the residue or *Remainder* of which is granted over to another. The necessity of creating this preceding particular estate, in order to make a good *Remainder*, arises from this plain reason; that *Remainder* is a relative expression, and implies that some part of the thing is previously disposed of: for where the whole is conveyed at once, there cannot possibly exist a *Remainder*; but the interest granted, whatever it be, will be an estate in possession. See *Co. Litt.* 49: *Plowd.* 25.

An estate created to commence at a distant period of time, without any intervening estate, is therefore properly no *Remainder*: it is the whole of the gift, and not a residuary part. And such future estates can only be made of chattel interests, which were considered in the light of mere contracts by the antient Law, to be executed either now or hereafter, as the contracting parties should agree: But an estate of freehold must be created to commence immediately; for it is an antient rule of the Common Law, that an estate of freehold cannot be created to commence *in futuro*; but it ought to take effect presently, either in possession or *Remainder*: 5 *Rep.* 94: Because, at Common Law, no freehold in lands could pass without livery of seisin; which must operate either immediately, or not at all. It would therefore be contradictory, if an estate, which is not to commence till hereafter, could be granted by a conveyance, which imports an im-

mediate possession. Therefore, though a lease to *A.* for 7 years, to commence from next *Michaelmas*, is good; yet a conveyance to *B.* of lands, to hold to him and his heirs for ever, from the end of three years next ensuing, is void. So that, when it is intended to grant an estate of freehold, whereof the enjoyment shall be deferred till a future time, it is necessary to create a previous particular estate, which may subsist till that period of time is completed; and for the grantor to deliver immediate possession of the land, to the tenant of this particular estate; which is construed to be giving possession to him in Remainder, since his estate and that of the particular tenant are one and the same estate in Law. As, where one leases to *A.* for three years, with Remainder to *B.* in fee, and makes livery of seisin to *A.*; here, by the livery, the freehold is immediately created, and vested in *B.* during the continuance of *A.*'s term of years. The whole estate passes at once from the grantor to the grantees, and the Remainder-man is seised of his Remainder at the same time that the termor is possessed of his term. The enjoyment of it must indeed be deferred till hereafter; but it is, to all intents and purposes, an estate commencing *in presenti*, though to be occupied and enjoyed *in futuro*.

As no Remainder can be created, without such a precedent particular estate, therefore the particular estate is said to *support* the Remainder. But a lease *at will* is not held to be such a particular estate, as will support a Remainder over. 8 *Rep.* 75. For an estate at will is of a nature so slender and precarious, that it is not looked upon as a portion of the inheritance; and a portion must first be taken out of it, in order to constitute a Remainder. Besides, if it be a Freehold Remainder, livery of seisin must be given at the time of its creation; and the entry of the grantor, to do this, determines the estate at will in the very instant in which it is made. *Dyer* 18. Or, if the Remainder be a chattel interest, though perhaps the deed of creation might operate as a *future contract*, if the tenant for years be a party to it, yet it is void by way of *Remainder*: For it is a separate independent contract, distinct from the precedent estate at will; and every Remainder must be part of one and the same estate, out of which the preceding particular estate is taken. *Raym.* 151. And hence it is generally true, that if the particular estate is void in its creation, or by any means is defeated afterwards, the Remainder supported thereby shall be defeated also: as where the particular estate is an estate for the life of a person not *in esse*; or an estate for life upon condition, on breach of which condition the grantor enters and avoids the estate: in either of these cases the Remainder over is void. *Co. Litt.* 298: 2 *Roll. Abr.* 415: 1 *Jon.* 58.

Secondly, The Remainder must commence, or pass out of the grantor, at the time of the creation of the particular estate. *Lit.* § 671: *Plowd.* 25. As, where there is an estate to *A.* for life, with Remainder to *B.* in fee: here *B.*'s Remainder in fee passes from the grantor at the same time that seisin is delivered to *A.* of his life estate in possession. And it is this, which induces the necessity at Common Law of livery of seisin being made, on the particular estate, whenever a *Freehold* Remainder is created. For, if it be limited even on an estate for years, it is necessary that the lessee for years should have livery of seisin, in order to convey the freehold from and out of the grantor; otherwise the Remainder is void. *Lit.* § 60. Not that the

livery is necessary to strengthen the estate for years; but, as livery of the land is requisite to convey the freehold, and yet cannot be given to him in Remainder, without infringing the possession of the lessee for years, therefore, the Law allows such livery, made to the tenant of the particular estates to relate and enure to him in Remainder, as both are but one estate in Law. *Co. Litt.* 49.

Thirdly, The Remainder must vest in the grantee during the continuance of the particular estate, or *eo instanti* that it determines. *Plowd.* 25: 1 *Rep.* 66. As, if *A.* be tenant for life, Remainder to *B.* in tail; here *B.*'s Remainder is vested in him, at the creation of the particular estate to *A.* for life: Or, if *A.* and *B.* be tenants for their joint lives, Remainder to the survivor in fee; here, though during their joint lives, the Remainder is vested in either, yet, on the death of either of them, the Remainder vests instantly in the survivor: wherefore both these are good Remainders. But, if an estate be limited to *A.* for life, Remainder to the eldest son of *B.* in tail, and *A.* dies before *B.* hath any son; here the Remainder will be void, for it did not vest in any one during the continuance, nor at the determination of the particular estate: and, even supposing that *B.* should afterwards have a son, he shall not take by this Remainder; for, as it did not vest at or before the end of the particular estate, it never can vest at all, but is gone for ever. 1 *Rep.* 138. And this depends upon the principle before laid down, that the precedent particular estate, and the Remainder, are one estate in Law; they must therefore subsist and be *in esse* at one and the same instant of time, either during the continuance of the first estate, or at the very instant when that determines, so that no other estate can possibly come between them. For there can be no intervening estate between the particular estate, and the Remainder supported thereby; 3 *Rep.* 21: the thing supported must fail to the ground, if once its support be severed from it. 2 *Comm.* c. 11.

If a man makes a lease to *A.* for life, and that after the death of *A.* and one day after, the land shall remain to *B.* for life, &c. this is a *void Remainder*, because not to take effect *immediately* on the determination of the first estate, and so during that time there would be an interruption of the livery, and no tenant of the freehold, either to do the services, or answer to the *fractises* of strangers: *Plowd.* 25: *Raym.* 144: that the Law is nice to an instant. 1 *Ld. Raym.* 316.

It is upon these rules, but principally the last, that the doctrine of *Contingent* Remainders depends. For Remainders are either *vested* or *contingent*. *Vested* Remainders, whereby a present interest passes to the party, though to be enjoyed *in futuro*, are where the estate is invariably fixed, to remain to a determinate person, after the particular estate is spent. As, if *A.* be tenant for twenty years, Remainder to *B.* in fee; here *B.*'s is a *vested* Remainder, which nothing can defeat, or set aside. See *post.* II. and also *post.* V. as to the distinction between Remainders *vested* and *executed*.

II. *CONTINGENT* or *Executory* Remainders (whereby no present interest passes) are where the estate in Remainder is limited to take effect, either to a dubious and uncertain *person*; or upon a dubious and uncertain *event*; so that the particular estate may chance to be determined, and the Remainder never take effect. 3 *Rep.* 20.

Thus, if *A.* be a tenant for life, with Remainder to *B.*'s eldest son (then unborn) in tail; this is a Contingent Remainder, for it is uncertain whether *B.* will have a son or no: but the instant that a son is born, the Remainder is no longer contingent, but vested. Though, if *A.* had died before the contingency happened, that is, before *B.*'s son was born, the Remainder would have been absolutely gone; for the particular estate was determined, before the Remainder could vest. Nay, by the strict rule of Law, if *A.* were tenant for life, Remainder to his own eldest son in tail, and *A.* died without issue born, but leaving his wife *enseint*, or big with child, and after his death a posthumous son was born, this son could not take the land, by virtue of this Remainder; for the particular estate determined before there was any person *in esse*, in whom the Remainder could vest. *Salk.* 228: 4 *Mod.* 282. But, to remedy this hardship, it is enacted, by *stat.* 10 & 11 *W.* 3. *c.* 16. That posthumous children shall be capable of taking in Remainder, in the same manner as if they had been born in their father's lifetime: that is, the Remainder is allowed to vest in them, while yet in their mother's womb.

The particular case on which this statute was passed, (as many statutes have arisen from circumstances of private hardship or injustice,) was as follows:—A father had devised an estate to his son for life, with a Remainder to the first and other sons of the son in tail; the son died, leaving his wife pregnant, who was afterwards delivered of a son: The Courts of *C. P.* and *K. B.* held clearly that the grandson, not being born at the expiration of the estate for life, was not entitled to take it; But the Lords, moved by the hardship of the case, reversed the judgment of the Courts below, contrary to the opinions of all the Judges. *Reeve v. Long.* 1 *Salk.* 227. & *alibi*. But the House of Commons, in reproof of what they considered as an assumption of legislative authority in the Lords, immediately brought in an act, which passed into the above statute. The statute only mentions *marriage and other settlements*; and it is probable that devises were designedly omitted to be expressed, from delicacy, and that the authority of the judgment of the Peers might not be too openly impeached. As the statute says, that the posthumous son, in this case, shall take the estate as if born before the death of the father, he is entitled to the intermediate profits from the death of the father; 3 *Atk.* 203; which is different from the case of a descent devested by the birth of a posthumous child. See title *Descent*; Rule I.

This species of Contingent Remainders, to a person not in being, must however be limited to some one, that may, by common possibility, or *potentia propinqua*, be *in esse* at or before the particular estate determines. 2 *Rep.* 51. As, if an estate be made to *A.* for life, Remainder to the heirs of *B.*: now, if *A.* dies before *B.* the Remainder is at an end; for during *B.*'s life he has no heir, *nemo est hæres viventis*: but if *B.* dies first, the Remainder then immediately vests in his heir, who will be entitled to the land, on the death of *A.* See *post*. This is a good Contingent Remainder, for the possibility of *B.*'s dying before *A.* is *potentia propinqua*, and therefore allowed in Law. *Co. Lit.* 378. But a Remainder to the right heirs of *B.* (if there be no such person as *B.* *in esse*,) is void. *Hob.* 33. For there must two contingencies happen; first, that such a person as *B.* shall be born; and, secondly, that he shall also die during the continuance of the particular estate; which make it *potentia remotissima*, a most improbable pos-

sibility. A Remainder to a man's eldest son, who hath none, (we have seen,) is good; for by common possibility, he may have one; but if it be limited in particular to his son *John*, or *Richard*, it is bad, if he have no son of that name; for it is too remote a possibility that he should not only have a son, but a son of a particular name. 5 *Rept.* 51. A limitation of a Remainder to a bastard, before it is born, is not good: for though the Law allows the possibility of having bastards, it presumes it to be a very remote and improbable contingency. *Cro. Eliz.* 509.

Next; with respect to a Contingent Remainder, where the person to whom it is limited is fixed and certain, but the *event* upon which it is to take effect is vague and uncertain. Where land is given to *A.* for life, and in case *B.* survives him, then with Remainder to *B.* in fee: here *B.* is a certain person, but the Remainder to him is a Contingent Remainder, depending upon a dubious event, the uncertainty of his surviving *A.* During the joint lives of *A.* and *B.* it is contingent; and if *B.* dies first, it never can vest in his heirs, but is for ever gone: but if *A.* dies first, the Remainder to *B.* becomes vested. 2 *Comm. c.* 11.

Contingent Remainders of either kind, if they amount to a freehold, cannot be limited on an estate for years, or any other particular estate, less than a freehold. Thus, if land be granted to *A.* for ten years, with Remainder in fee to the right heirs of *B.*; this Remainder is void: but if granted to *A.* for life, with a like Remainder, it is good. 1 *Rept.* 130. For, unless the freehold passes out of the grantor at the time when the Remainder is created, such Freehold Remainder is void: it cannot pass out of him, without vesting somewhere; and in the case of a Contingent Remainder, it must vest in the particular tenant, else it can vest no where; unless, therefore, the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him, and consequently the Remainder is void. 2 *Comm. c.* 11.

A Contingent Remainder is defined, by *Fearne*, to be a Remainder limited so as to depend on an event or condition, which may never happen or be performed; or which may not happen or be performed, till after the determination of the preceding estate; for, if the preceding estate (unless it be a mere trust estate) determine before such event or condition happens, the Remainder will never take effect. Under this definition, we may properly distinguish four sorts of Contingent Remainders. *First*, Where the Remainder depends entirely on a *contingent* determination of the preceding estate itself.—*Secondly*, Where the contingency on which the Remainder is to take effect is independent of the determination of the preceding estate.—*Thirdly*, Where the condition, upon which the Remainder is limited, is certain in event, but the determination of the particular estate may happen before it.—*Fourthly*, Where the person, to whom the Remainder is limited, is not yet ascertained, or not yet in being. *Fearne*, 3, 4.

In the case of *Dormer v. Fortescue*; [reported in its various stages by the name of *Dormer v. Fortescue*; *Dormer v. Parkhurst*; *Barrington d. Dormer v. Parkhurst*; *Smith v. Packhurst*, or *Parkhurst*; *Parkhurst v. Smith*, &c. See *Bro. P. C.* titles *Fine*; *Remainder*;] an estate was limited (after several precedent estates) to the use of *A.* for 99 years, if he should so long live; and after his decease, or the sooner determination of the estate limited to him for 99 years, to the use of

trustees, and their heirs, during his life, upon trust, to preserve the Contingent Remainders: and after the end or determination of that term, to the use of *A.*'s first and other sons successively in tail-male; Remainder to the heirs of the body of the original settler; Remainder to such settler's right heirs. All the preceding estates being determined, *A.* came into the possession of the lands limited to him for 99 years; and having a son, they joined in levying a fine, and suffering a common Recovery, in which the son was vouched. If the trustees took a vested estate of freehold during the life of *A.*, the Recovery was void, there not being a good tenant to the *franchise*, the father being only tenant for years; but if they took a contingent estate, the freehold was in the son, and of course there was a good tenant to the *franchise*. Upon this point, the case was argued in the Court of *K. B.* and afterwards on appeal before the House of Lords, where all the Judges were ordered to attend. *Lee*, C. J. when the cause was heard in *K. B.*, and *Willes*, C. J. in delivering the opinion of the Judges in the House of Lords, entered very fully into the distinction between contingent and vested remainders. They seem to have laid down the following points:—That a Remainder is contingent, either where the person to whom it is limited is not *in esse*, or where the particular estate may determine before the Remainder can take place: but that in every case where the Person to whom the Remainder is limited is *in esse*, and is actually capable, or entitled, to take, on the expiration or sooner determination of the particular estate, supposing that expiration or determination to take place at that moment, there the Remainder is vested. That the doubt arose, by not adverting to the distinction between the different nature of the contingency, in those cases where the Remainder is limited to a person *in esse*, but the title of the Remainder-man depends on a collateral or extraneous contingency, which may or may not, take place during the continuance of the preceding estate; and those cases where the preceding estate may endure beyond the continuance of the estate in Remainder. Thus, if an estate is limited to *A.* for life, and, after the death of *A.* and *J. S.*, to *B.* for life, or in tail, there, during the life of *J. S.*, the title of *B.* depends on the contingency of *J. S.* dying in the life-time of *A.* This being an event, which may, or may not, take place during the continuance of the preceding estate, *B.*'s estate is necessarily contingent. But then, supposing *J. S.* to die, still it remains an uncertainty whether *B.*'s estate will ever take place in possession: for, if the Remainder be limited to *B.* for life, there, if *B.* dies in *A.*'s life-time, *A.*'s estate would endure beyond the continuance of the estate limited in Remainder. The same would be the case if the Remainder over were limited to *B.* in tail, and *B.* was to die in *A.*'s life-time without issue. Yet, in both cases, it was agreed, that *B.* took not a contingent, but a vested Remainder. Hence they inferred, that it was not the possibility of the Remainder over never taking effect in possession, but the Remainder-man's not having a capacity or title to take, supposing the preceding estate at that instant to expire or determine, together with its being uncertain whether he ever will obtain that capacity or title, during the continuance of the preceding estate, that makes the Remainder contingent. Upon these grounds they determined, that the Trustees took a vested Remainder, and that the Recovery therefore was void.—The doctrine established in this case is laid down very precisely by *Coke*, 10 *Repl.* 85. where he with great

accuracy of expression, observes that where it is dubious and uncertain whether the use or estate limited in future shall ever *vest in Interest* or not, then the use or estate is in contingency; because upon a future contingent, it may either vest or never vest, as the contingent happens. See 1 *Rep.* 137, *b*: 1 *Inst.* 265. *a. in n*: and *post* V.

If an estate be limited, either at Common Law, or by way of use, to one for life, or in tail, Remainder to the right heirs of *J. S.* who is then dead; this is a good Remainder, and vests presently in the person who is heir at law to *J. S.* by purchase: see *post* V. and though a daughter be then heir at law, and after a son is born, yet shall the daughter retain the land against him; for she being heir, and coming within the description at the time when the Remainder was limited, it then vested and settled in her, immediately, as a Remainder by Purchase, and shall not, by any accident after, be defeated. 2 *Roll. Abr.* 415: 1 *Co.* 95. 103: *Plowd.* 56.

But if *J. S.* be living at the time of the Remainder limited to his right heirs, this puts such Remainder in abeyance or contingency; that is, it is in no person, but *in nubibus*, till the contingency happens; for it is not in the feoffor, or donor, because he has limited it out of him, and all Remainders must *pass out of him* at the time of the limitation, though they do not presently vest in the person intended; and in the right heirs of *J. S.* it cannot be, because he cannot have heirs during life; so there is no person, *in rerum natura*, within the description, to take it; therefore it is, in the mean time, *in abeyance or expectancy*, to vest or not vest, as the case happens; for if *J. S.* dies during the particular estate, then the Remainder presently takes place in his heirs; but if the particular estate determines, by death or otherwise, in the life of *J. S.* then such Remainder is become totally void, and can never vest; but the estate settles again in the feoffor, or donor, as if no such limitation in Remainder had been; and he becomes tenant to the *fræcipe*, and is obliged to do the services; and though *J. S.* die soon after, yet his heir can have no benefit by it, not being capable of taking the Remainder when it fell. 1 *Co.* 135: *Co. Lit.* 378, *a*: 2 *Co.* 51: 3 *Roll. Abr.* 415: *Plow.* 28. 556: *Poph.* 74: *Moor* 720: 3 *Co.* 20: 10 *Co.* 50: *Raym.* 145: *Pollex.* 56. See *Fearne* 526—534, &c. where this doctrine of the Remainder being in *abeyance* is considered as in some measure unintelligible; and another question depending thereon is stated thus: “A man [by settlement or will] makes a disposition of a Remainder, or future interest, which is to take no effect at all until a future event or contingency happen; it is admitted, that no interest passes by such a disposition, to any body, before the event referred to takes place. The question is, what becomes of the intermediate reversionary interest from the time of the making such future disposition, until it takes effect? It was in the grantor, or testator, at the time of making such disposition, it is confessedly not included in it: The natural conclusion seems to be, that it remains where it was, *viz.* in the grantor, or the testator, and his heirs; for want of being departed with to any body else.—When the future disposition takes effect, then the reversionary or future interest passes, pursuant to the terms of it; but if such future disposition fails of effect, either by reason of the determination of the particular estate, failure of the contingency, or otherwise, what is there then to draw the estate, which was the intended subject of it, out of the grantor or his heirs, or the heirs of the testator? or who can derive title to an estate under a prospective

disposition which confessedly never takes any effect at all? *Fearne* 285, 6. 533.

But if there be no such *J. S.* at the time of the limitation, though he be after born, and dies, during the particular estate; yet his heirs shall never have the Remainder. So, if a Remainder be limited to *A.* son of *B.* in tail, &c. or to *E.* wife of *D.*, where in truth there is no such *A.* or *E.*, though *B.* has a son called *A.*, or *D.* marries one *E.*, yet they can never take the Remainder; because if there be such persons as the words of the gift import, there the Remainder ought to vest in them presently, and they will never after be made capable of taking it; but if there be no such person then *in esse*, none who come within that description after, can lay claim to it, because the limitation was present to such persons; but a Remainder limited *primogenito filio*, or *proximo heredi masculino* of *A.* or *propinquioribus heredibus de sanguine puerorum*, or *seniori puero* of *A.*, or to the right heirs of *A.*, there being then such *A.* *in esse*, or to the wife *A.* shall marry; these are good Remainders, and vest when such persons come *in esse* as are within the description; because here appears no present regard for any person in particular; therefore, if they answer the description at any time before the particular estate determines, it is time enough; and so there is a diversity between a Remainder limited to one, by name *in particular*, and such Remainder limited by *description* or *circumlocution*, or between a general name and a special name. *Co. Lit.* 3: 1 *Co.* 66: 2 *Co.* 51: *Hob.* 33: *Moor* 104: *Dyer* 337: 2 *Leon.* 210: 1 *Roll. Rep.* 254.

A. makes a lease to *B.* for life of *B.*, and after the death of *A.* to remain to *B.* and his heirs; this Remainder is contingent, and cannot vest presently, for if *A.* survives *B.* it is void; and because, otherwise, the operation of livery would be interrupted during the life of *A.*, for he cannot give himself any estate, his livery operating to pass estates from him, not to give any to him who had the whole before: therefore, *during his life, the operation of the livery must cease*, and by consequence no Remainder can take effect in virtue of that livery, which *pro tempore* being at an end, all that depended thereon ceases too; and can never after be revived; for the livery must carry out all the estates at once from the feoffor; and if he comes again into the possession before they can all take effect, this breaks the force of the livery, and brings back again to him all that such livery had taken out from him, and then they never can take effect but by a new livery: This is the reason of the common case, that one cannot give lands to another to begin after his death, because, being to make livery presently, if that cannot operate presently, it can never operate at all; for it is a contradiction to give lands to one by a solemn livery, which is an act executed, and works presently; and yet, by words, to restrain that operation to a future time: But in the principal case, where *A.* dies first, there no interruption is of the livery, for *B.* had an estate for life by virtue thereof; and before that determines, the same livery which carried the Remainder in abeyance, for the uncertainty of its taking effect, does on *A.*'s death direct and settle, or bring down the Remainder to *B.* and his heirs. 10 *Co.* 85.

If a lease be made to *A.*, *B.*, and *C.*, for their lives, and if *B.* survives *C.*, then to remain to *B.* and his heirs: *this Remainder is in abeyance*, because, though the person be certain, yet since it depends on *C.*'s dying before him, till that be known the Remainder cannot

vest. So if a lease be made to *A.* for life, and after the death of *B.* who is a stranger, to remain to *C.* in fee, or to *A.* in fee; these Remainders are in abeyance or contingency, and depend on *B.*'s dying before *C.* or *A.*, for if he survives them, the Remainder cannot take effect. 3 Co. 20: 10 Co. 85: Co. Lit. 378.

If a lease were made to *A.* for life, Remainder to the abbot of *D.* and his successors, though the abbot were then dead, so as there were then no abbot at all, yet the Remainder should be good, if an abbot were made before the death of *A.* So, of a Remainder to a mayor, and commonalty, dean and chapter, prior and convent, &c. though there be then no mayor, dean or prior. So, of a Remainder to the bishop of *D.*, parson of *D.*, or other sole corporation, and his successors; these Remainders (not being limited to them by name specially, but to them generally, and so whoever comes within the description before the determination of the particular estate, is capable of taking by virtue thereof,) are good Remainders in abeyance, &c. But if there be no such corporations at the time of the limitation, then the Remainders are totally void; and none created after, though by the same name, can take these Remainders, not even if a patent be then passed to make such corporation. Co. Lit. 264; Hob. 33; 2 Co. 51: 10 Co. 30: Moor 104: 1 Rol. Rep. 254: 2 Bulst. 275.

Contingent Remainders may be defeated, by destroying or determining the particular estate upon which they depend, before the contingency happens whereby they become vested. 1 Rep. 66. 135. Therefore, when there is tenant for life, with divers Remainders in contingency, he may, not only by his death, but by alienation, surrender, or other methods, destroy and determine his own life-estate, before any of those Remainders vest; the consequence of which is, that he utterly defeats them all. As, if there be tenant for life, with Remainder to his eldest son unborn in tail, and the tenant for life, before any son is born, surrenders his life-estate, he by that means defeats the Remainder in tail to his son: for his son not being *in esse*, when the particular estate determined, the Remainder could not then vest; and, as it could not vest then, by the rules before laid down, it never can vest at all. In these cases, therefore, it is necessary to have trustees appointed to preserve the Contingent Remainders; in whom there is vested an estate in Remainder for the life of the tenant for life, to commence when his estate determines. If, therefore, his estate for life determines otherwise than by his death, the estate of the trustees, for the residue of his natural life, will then take effect, and become a particular estate in possession, sufficient to support the Remainders depending in contingency. See *post.* V. This method is said to have been invented by Sir Orlando Bridgman, Sir Geoffrey Palmer, and other eminent Counsel, who betook themselves to conveyancing during the time of the Civil Wars; in order thereby to secure in family settlements, a provision for the future children of an intended marriage, who before were usually left at the mercy of the particular tenant for life: and when, after the Restoration, those gentlemen came to fill the first offices of the Law, they supported this invention, within reasonable and proper bounds and introduced it into general use. 2 Comm. c. 11. See Moor 468: 2 Roll. Abr. 797. pl. 12: 2 Sid. 159: 2 Chan. Rep. 170.

III. When lands are given in undivided shares to two or more for

particular estates, so as that, upon the determination of the particular estates in any of those shares, they remain over to the other grantees, and the Reversion or Remainder-man is not let in till the determination of all the particular estates, then the grantees take their original shares as tenants in common; and the Remainders limited to them, on the determination of the particular estates, are known by the appellation of *Cross Remainders*.—These Remainders may be raised both by deed and will; in deeds they can only be created by express words, but in wills they may be raised by implication. 1 *Inst.* 195, *b. in n.*

A. having issue five sons, his wife being enseint, devised two-thirds of his lands to his four younger sons, and the child *in ventre sa mere*, if he were a son, and their heirs; and if they all died without issue male of their bodies, or any of them, that the lands revert to the right heirs of the devisor: By this devise, *the younger sons were tenants in tail in possession, with Cross Remainders in tail to each other*, and no part shall revert to the heir of the devisor, till all the younger sons be dead without issue male of their bodies. *Dyer* 303.

But where one having issue three sons, *A.*, *B.*, and *D.*, devises one house to *A.* and his heirs, another to *B.* and his heirs, and a third to *D.* and his heirs; provided, that if all his said children die without issue, that then the messuages remain and be to his wife and her heirs: It was held by three Judges, that, *on the death of one of the sons without issue, the wife might enter*, and that here there were no Cross Remainders from one son to another, because, being devised to them severally by express limitation, there shall be no greater estate to them by implication. *Gilbert v. Witty*, *Cro. Jac.* 655: 2 *Roll. Ref.* 281: 1 *Ventr.* 224: *Raym.* 455: *Fitzg.* 97: 2 *Jon.* 82: *Carth.* 173.

In the above case it was said, by Justice *Dodderidge*, that Cross Remainders shall never be raised, by implication, between more than two. This doctrine received some countenance from what was said by the Courts in the cases of *Cole v. Levingstone*, 1 *Ventr.* 224: *Holmes v. Meynell*, *T. Raym.* 452. and some other cases. See 4 *Leon.* 14. But it seems entirely exploded by the cases of *Burden v. Burville*, *B. R. Pasch.* 13 *Geo.* 3: *Richmond (D.) v. Cadogan (E.)*, *Chanc. May* 1773: *Wright v. Holford & al.* *Cowp.* 31. and some other subsequent cases. It seems, however, to be admitted in these cases, that to raise Cross Remainders between more than two, stronger implication is required, than to raise them between two only. 1 *Inst.* 195, *b. in n.*: and see 4 *Term Ref.* *K. B.* 713, that the Rule is, that as between two only it shall be presumed that Cross Remainders were intended to be raised: but if there be more than two, it is necessary to resort to other words in a Will to discover an intention to raise them. See also 2 *East's Ref.* 36. 47.

One seised of lands in fee, by will devises *Black Acre* to *A.* his daughter, and her heirs, and *White Acre* to his daughter *B.* and her heirs; and if she die before the age of sixteen years, living *A.*, then *A.* to have *White Acre* to her and her heirs; and if *A.* die, having no issue, living *B.*, then *B.* to have the part of *A.* to her and her heirs; and if both die having no issue then to *J. S.* and his heirs; the testator dies; *B.* attains her age of sixteen years, and *then* dies, without issue in the life of *A.*; and it was held by three Justices, against *Dyer*; 1st, That *the daughters had an estate-tail on the whole will*, and not a fee determinable on a contingency subsequent; 2dly, That, by

the words "*if both die without issue*," no Cross Remainders in tail were created by implication, but that on *B.*'s death without issue, after sixteen, *J. S.* should have her part presently without staying till the death of *A.* without issue. *Dyer* 330: 1 *Bendl.* 212: 1 *Roll. Abr.* 839: *Vaugh.* 267.

A. seised of lands in fee, by will devises all his lands in the county of, &c. to his two daughters *B.* and *D.* and their heirs, equally to be divided betwixt them; and in case they happen to die without issue, then to his nephew *J. S.* and the heirs male of his body, and dies; and it was adjudged, that on the death of *B.* one of the daughters of the other sister took her moiety as a Cross Remainder. *Raym.* 452: *Skin.* 17: 2 *John.* 172: 2 *Shoep.* 136: *Pollex.* 434. and see 2 *Vern.* 545: 3 *Mod.* 107.

Richard Holden seised in fee, and having issue, a son and three grandchildren, by his will devised part of his estate to his wife for her life; and the reversion of such part, expectant on her death, and all other his freehold tenements, &c. he gave to his son *Richard Holden* for life, and after his death to his first and other sons successively *in tail male*, and *for default of such issue*, and after the determination of the said estates, he gave the premises to his grandson *Richard Holden*, and his granddaughter *Elizabeth Holden*, to be equally divided between them, and to the heirs of their respective bodies issuing; and for default of such issue, he gave the premises to his granddaughter *Anne* in fee: The testator died seised, *Richard* the son died without issue male, whereupon *Elizabeth* and the grandson entered, and *Elizabeth* died without issue generally; *Anne Holden* married *John Jervis*; and the question was, Whether there were Cross Remainders, between *Elizabeth* and *Richard* the grandson, or whether the moiety of *Elizabeth* should go to *Anne* or to *Richard*? And it was resolved, that *there were no Cross Remainders* between them, because here are no *express* words, nor is there a necessary implication, without one of which Cross Remainders cannot be raised; that the words, *and for default of such issue*, being relative to what goes before, mean only and for default of heirs of their respective bodies; and therefore it is no more than as if it had been a devise of one moiety to *Richard* and the heirs of his body, and of the other moiety to *Elizabeth*, and the heirs of her body; and for default of heirs of their respective bodies, Remainder over; in which case there could be no doubt; and it was held, that this case differed from the case *suprà*, the word *respective* being in that case, and the first devisees were the testator's daughters, and the Remainder-man only a nephew; whereas, in the present case, *Anne* was as near to the testator as *Richard*. *Comber v. Hill*, 2 *Kely.* 188: 2 *Barn. K. B.* 367. 443: *Browne v. Williams*, *Mich.* 8 *Geo.* 2.

IV. As to estates of inheritance, there can be no doubt but that the grantor, having a perpetual and durable interest in the estate, may share and divide it, or grant as many Remainders over as he thinks proper. 4 *New Abr.* 492.

But as to personal goods and chattels, it was formerly held, that *they, in their own nature, were incapable of any limitation over*; being things *transitory*, and by many accidents subject to be lost, destroyed, or otherwise impaired, and the exigences of trade requiring a frequent circulation thereof, in which they differ from lands and

tenements which are permanent; therefore what is called an *estate in lands*, is termed *property* in personal chattels: Wherefore it was held that a grantor's devise of a personal thing to one, though but for an hour, or minute, was a *gift for ever*; and an absolute disposition of the entire property. *Bro. Devise* 13: *Plowd.* 521: *Dyer* 74: 8 *Co.* 94.

Hence it was a long time before the Courts of Justice could be prevailed upon, to have any regard for a devise over, *even of a chattel real*, or a term for years, after an estate for life limited thereon; because the estate for life being, in the eye of the Law, of greater regard and consideration than an estate for years, they thought he, who had it devised to him for life, had therein included all that the devisor had a power to dispose of, *but now such Remainders over are allowed under the name of Executory Devises*, and are established both in Courts of Law and Equity, provided they tend not to a perpetuity, so as to make estates unalienable. 4 *New Abr.* 294. See this Dict. title *Executory Devise*.

Also a distinction was formerly taken between a devise of a personal chattel to one for life, with a *Remainder* over, and of the *use only*; that in the first case the devisee for life had the absolute property; but not so in the second, for that the first devisee had not the property of the goods, but only a special interest in them, so that there still remained a property which might be limited over: But this distinction is now exploded, and the devisee in remainder is allowed in Equity the like remedy in both cases. *Plowd.* 521: *Cro. Car.* 346: 1 *Roll. Abr.* 610: *March* 106: *Owen* 33: 1 *Ch. Ca.* 129: 2 *Vern.* 245: 1 *P. Wms.* 1. 502. 651: 2 *Comm. c.* 25. *p.* 398.

But a devise of a term for years, or personal chattel, to one, for a day, or an hour, is a devise of the whole term or interest, if the limitation over is void, and it appears at the same time that the whole was intended to be disposed of from the executors. 1 *P. Wms.* 666.

A. being possessed of a term for ninety-nine years, devised it to *B.* for life, and after to six others successively, for their lives, if the term so long continue; and all the seven persons being dead, and the term continuing, it was adjudged, that it should revert to the executors of the testator, and that it did not vest in the survivor of the devisees, so as to transmit it to his representatives. 1 *Salk.* 231: 1 *Ld. Raym.* 325.

A farmer devised his stock (which consisted of corn, hay, cattle, &c.) to his wife for life, and after her death to the plaintiff. It was objected, that no remainder can be limited over of such chattels as these, because the use of them is to spend and consume them; but the Master of the Rolls said *the devise over was good*, but added, if any of the cattle were worn out in using, the defendant was not to be answerable for them; and if any were sold as useless, the defendant was only to answer the value of them at the time of the sale; and an account was decreed to be taken accordingly. *Abr. Eq.* 361.

A. gives his sister, by will, 10*l.*, and directs, that such part of his personal estate, as his wife should leave of her substance, should go to the sister; whatever the wife has not employed in that way shall go over, and be accounted for. 1 *P. Wms.* 651.

But if a chattel real, money, goods, or other personal things, are devised to one, and the heirs of his body. or to one, and, if he dies without heirs of his body, *Remainder* over, by which the devisee has an estate-tail; this *Remainder* is totally void, and the Courts of Equity

will not allow of a bill by the Remainder-man to compel security, &c. or to have the money, &c. after the death of the first devisee, but it shall go to his executors or administrators; for the first devise gives the absolute property of a personal estate, as the like devise of a real estate, before the statute *De donis*, gave the absolute fee, upon which no limitation could be made further; and as the heirs are the representatives to take the real estate, so are the executors to take the personal estate; and this is not within the statute *De donis*, but remains as at Common Law. 2 *Vent.* 349: 2 *Vern.* 600: 1 *Salk.* 156.

If *A.* devise that his goods and furniture shall remain in his house, to be enjoyed, according to the limitations of his will, by those entitled to the house; the first, who would be tenant in tail of the house becomes absolute owner of the goods. See further, title *Executory Devise*.

Not only lands and tenements, but also rents, commons, estovers, or any other interest or profits *in esse*, wherein the grantor hath the absolute property to him and his heirs, may be granted with Remainder over. *Plowd.* 379: 9 *Co.* 48. 97.

So, if one hath the office of park-keeper, forester, gaoler, sheriff, &c. to him and his heirs, he may grant those offices to one for life, Remainder to another for life, &c. for *omne majus continet in se minus*; and as they are grantable over in fee, so may they be granted in succession to one for life, with Remainders over, &c. 9 *Co.* 48: 1 *And. fil.* 201.

It was formerly doubted, whether there could be a *Remainder* of a rent *de novo*; that is, whether a man, seised of lands in fee, could thereout grant a rent-charge to one for life or years, Remainder to another in fee, or in tail; and this doubt arose from *the rent not having any existence before it was created*, consequently, no reversion could be left to the grantor, out of which the Remainder was to arise: But it is now settled, that such grant in Remainder is good, the grantor having the absolute interest in the estate out of which it is to arise, and his intention gives it, being for the whole, out of which the lesser estates are carved. But if he grant such rent for life or years, to one, without going further, he cannot after grant the reversion thereof to another, because he has no reversion in him. 2 *Rol. Abr.* 415: 2 *Co.* 70. 76: 2 *Vent.* 240: 1 *Lev.* 144: 1 *Sid.* 285: 2 *Salk.* 577: 2 *Lutw.* 1225: *Moor fil.* 100. See title *Rent*.

The King may grant an estate in an office, to commence *in futuro*, or on a contingency, for he hath no inheritance in the office, as to the execution of it, but in point of interest only to grant. And there is a diversity between offices in fee existing, and such as are granted only for life; which, being as a new thing created, may, as a rent *de novo*, be granted to commence *in futuro*. 4 *Mod.* 275: 1 *Ld. Raym.* 52: *Carth.* 350: *Salk.* 465: *Comb.* 334.

If one be created Baron, Viscount, Earl, &c. by patent, and after, in the same patent, the same honour is granted to another in *Remainder*, yet *this operates as a new grant*, and not as a *Remainder*; for the King had no reversion of that honour in him, though he had still the same power of appointing one in succession to take it, as he had of granting it to the first. *Show. Parl. Ca.* 5. 11.

V. THE word Remainder is no term of art, nor is it necessary to create a Remainder. So that any words, sufficient to shew the intent of the party, will create a Remainder; because such estates take their

denomination of Remainders, more from the nature and manner of their existence, after they are limited, than from any previous quality inherent in the word REMAINDER. To make them such, therefore, if a man gives land to *A.* for life, and that after his death the land shall revert, or descend, to *B.* for life, &c. this is a good Remainder, and may be pleaded as such. 1 *Roll. Abr.* 416: *Plowd.* 29: 1 *Roll. Ref.* 319: *Dyer* 125.

So, if lands are given to one, and the heirs male of his body, and to him, and the heirs female of his body; this limitation to the heirs female is a Remainder; because it is not to take place till the estate to the heirs male is spent. *Co. Lit.* 377, *a.*

So, if lands are given to a widow, and to the heirs of the body of her late husband, *on her begotten*. This is a Remainder to the heirs of the body of the husband; because it cannot take effect till after the widow's death, who has an estate for life. *Co. Litt.* 26. 200: 2 *Mod.* 210.

So, an estate limited to *A.* for life, or in tail, and after his decease, or for default of such issue, to *B.* and the heirs of his body, is good, though there be not the word *Remainder*. So, if a lease be made to *A.* for life, and that after his death *B.* shall have the profit; this is a good Remainder to *B.* *Plowd.* 159: *Moor pl.* 54: *Dyer* 125: 1 *Roll. Ref.* 319: *Cro. Eliz.* 10. 742.

So, a lease to *A.* for life, and that after his death his children shall have it, is a good Remainder. 6 *Co.* 17, *b.*: *Raym.* 83.

Nay, though an estate be limited expressly as a Remainder, yet, if it be not so in construction of Law, the word *Remainder* will have no force to make it such. As, if *A.* seised of lands in fee, he and *B.* levy a fine to *D.* in fee, who grants, and renders to *B.* in tail, rendering rent to *A.*, and if *B.* died without issue, *tenementa præd. integrè remanebunt* to *A.* and his heirs; *B.* suffers a common recovery; *A.* distrains for his rent: This was adjudged a *reversion*, and as such the rent passed with it to *A.*, and was chargeable on the land in whose hands soever it came, by virtue of the contract, which cannot be destroyed by the recovery, though the reversion is thereby barred. *Cro. Eliz.* 727. 768. 792: *Moor pl.* 795: *Co. Litt.* 299: *Raym.* 142.

If a lease be made to *A.* for eighty years, if he so long live, and if he die within the term, then the land to go over to another for the residue of the eighty years; this is a good Remainder, because, though the term or interest be determined, yet the land and part of the years, still remain; these years may be made the measure of the succeeding interest, as any other number of years may be. *Cro. El.* 216: 1 *Leon.* 218: 1 *Co.* 153: 3 *Leon.* 195: 2 *Roll. Abr.* 415: *Plowd.* 198: *Moor* 247. 520. *pl.* 441: 1 *And.* 259.

J. S. seised of lands in fee, by indenture, demises them to *A.* for life, *habendum* to *B.*, *D.*, and *E.*, his three sons for their lives, and the life of the survivor of them *successively*; after the death of *A.*, it was adjudged in this case: First, That if the sons could take, it must be *by way of Remainder*, they not being parties to the deed; and then it must be as joint-tenants, which could not be by reason of the word "*successively*." Secondly, That they could not take in succession, for the uncertainty whose estate or interest was to commence first. *Hob.* 313: *Hut.* 87.

A., by indenture, makes a lease to *B.* for forty years, if *A.* so long live, and after his death to *D.* (who was no party to the deed,) for one

thousand years; and then *A.* levies a fine, and dies, and five years pass after his death, and then the plaintiff claiming under *D.* enters, &c.: This is *no Remainder* at all to *D.*; for, First, Presently it cannot vest by reason of the lessor's life interposing, therefore *no Remainder* is vested. Secondly, As a *Contingent Remainder*, it cannot be good; because then *it ought to have a particular estate to support it*, and ought to be in abeyance, or contingency, to vest or not vest when that determines: But here the first lease is no such particular estate; because that reaches not to the commencement of the *Remainder*, nor is the *Remainder* limited with any regard to the particular estate; because it is not to commence on the determination of that, but at a future time, *viz. on the death of the lessor*; and there is no contingency in the case, for it is to take effect, at all events, on the death of the lessor, be it before or after the end of the term; therefore, it can be no other than a future *interesse termini*, to begin after the death of the party who grants it, which, being but for years, it may well do; because *it enures by way of contract*; and though the grantee *there* was no party to the deed, and therefore, as objected, could take nothing, yet it appears, that judgment was given for the plaintiff; which proves, First, That the grantee had an interest: Secondly, that this interest was not barred by the fine, and five years' non-claim after the death of the grantor, not being touched, divested or turned to a right; Thirdly, That though the grantee was no party to the indenture, yet he might well take by virtue thereof; if he gets the indenture to make out his title; for the grantor cannot derogate from his own grant, or avoid his own acts. *Raym.* 140.

We next come to consider the question, what shall be *words of limitation*, and what *words of purchase*.

In a grant of an estate in fee-simple to *A.*, it is necessary to give it to *A. and his heirs*: Of an estate in fee-tail, to *A. and the heirs of his body*: And a grant to *A.* without any additional words, gives him only an estate for life. Hence the word *heirs*, and the words *heirs of the body* in the second, are said to be words of limitation; because they limit or describe what interest *A.* takes by the grant, *viz.* in one case a fee-simple, in the other a fee-tail: And the heirs, in both instances, take no interest, any farther than as the ancestor may permit the estate to descend to them. But if a *Remainder* is granted, or an estate devised, to the *heirs of A.* where no estate of free-hold is at the same time given to *A.*, the heir of *A.* cannot take by descent from *A.*; but he takes by purchase under the grant, in the same manner as if the estate had been given to him by his proper name. Here the word *heirs* is called a word of purchase. 2 *Comm. c.* 11. *ff.* 172, *in n.*

Further to elucidate this contested question, it may be proper to state the much talked of rule in *Shelly's case*, and Mr. *Fearne's* definition of the terms *words of limitation*, and *words of purchase*.

The rule in *Shelly's case* is this:—When the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately, or immediately to his heirs in fee, or in tail, always in such cases the *heirs* are words of limitation, and not words of purchase. 1 *Co.* 104. And the *Remainder* is said to be *executed* in the ancestor, where there is no intermediate estate; or *vested*, where an estate for life or in tail intervenes. 2 *Comm. c.* 11, *in n.* Otherwise, (continues *Coke*,) it is where an estate for years is limited to the ancestor, the *Remainder* to another for life, the *Remainder* to

the right heirs of the lessee for years, then his heirs are *purchasers*, &c. 1 Co. 104.

Mr. *Fearne*, after examining the terms used by *Coke*, in laying down the above rule, and vindicating them from the charge of inaccuracy, to which Mr. *Douglas* had considered them liable, seems to have fully settled the distinction between words of limitation and words of purchase, in the following manner:

When the words *Heirs*, &c. operate only to expand an estate in the ancestor, so as to let the *heirs* described into its extent, and entitle them to take derivatively through or from him, as the root of succession, or person in whom the estate is considered as *commencing*, they are properly words of limitation; but when they operate only to give the estate, imported by them, to the heirs described, *originally*, and as the persons in whom that estate is considered as *commencing*, and not derivatively from or through the ancestor, they are properly words of purchase. Lord *Coke*, in the rule above alluded to, very properly refers the word *purchase* to the express objects of limitation, viz. *heirs*, &c. And when such heirs, &c. originally acquire the estate by those words, he styles them words of purchase; otherwise, not. In general, words of *purchase* are those, by which, taken absolutely without reference to, or connexion with, any other words, the estate first attaches, or is considered as *commencing* in the person described by them; whilst words of *limitation* operate by reference to, or connexion with, other words, and extend or modify the estate given by those other words. This is evidently the line of distinction adopted by Lord *Coke*, and which pervades the terms of the rule in question; and is in fact admitted by all who do not deny the word *heirs*, in the common limitation to a man and his heirs for ever, to be words of limitation. But it is to be remarked, that when the words *heirs male of the body*, &c. operate as words of *purchase*, that is, when they do not attach in the ancestor, but vest in the person answering the description of such special heir, they appear to have a sort of equivocal or mixt effect: for though they give the estate to the special heir originally, and not through or from his ancestor, yet the estate which he so takes has such a reference to the ancestor, as to pursue the same course of succession, in the same extent of duration or continuance, through the same persons, as if it had attached in and descended from the ancestor. *Fearne's Cont. Rem.* 107—109. &c. edit. 1791.

If then, an estate be given to *A.* for life, and after his death to the heirs of his body, this Remainder is *executed* in *A.*, or it unites with his estate for life; and the effect is the same as if the estate had at once been given to *A.* and the heirs of his body; which expression limits an estate-tail to *A.*; and the issue have no indefeasible interest conveyed to them, but can only take by descent from *A.*—So, also, if an estate be given to *A.* for life, with Remainder to *B.* for life, or in tail, Remainder to the heirs, or the heirs of the body of *A.*; in this case, *A.* takes an estate for life, with a *vested* Remainder in fee, or in tail; and his heir, under this grant, can only take by descent at his death. *Fearne* 21. But in order that the estate for life, and the Remainder in tail or in fee, should thus unite and coalesce, and *heirs* be a word of limitation, the two estates must be created by the same instrument, and must be either both legal, or both trust estates. *Doug.* 490: 2 *Term Rep.* 444. The rule with regard to the execution or coalition of such estates seems now to be the same in equitable as in

legal estates. 1 *Bro. C. R.* 206. And in all these cases where a person has an estate-tail, or a vested Remainder in tail, he can cut off the expectations or inheritance of his issue by a fine or a recovery. *Doug.* 233.

In order, therefore, to procure a certain provision for children, the method was invented of granting the estate to the father for life, and after his death to his first and other sons in tail; for the words *son* or *daughter* were held to be words of purchase; and the Remainder to them did not, like the Remainder to *heirs*, unite with the prior estate of freehold. But if the son was unborn, the Remainder was contingent, and might have been defeated by the alienation of the father, by feoffment, fine, or recovery; (though a conveyance of a greater estate than he has by bargain and sale, or by lease and release, is no forfeiture, and will not defeat a contingent remainder. 2 *Leon.* 60: 3 *Mod.* 151.) To prevent this alienation by tenant in tail, it was necessary to interpose trustees, to whom the estate is given upon such a determination of the life-estate, and in whom it rests till the contingent estate, if at all, comes into existence: and thus they are said to support and preserve the Contingent Remainders. This is called *A Strict Settlement*, and is the only mode (*Executory Devises* excepted) by which a certain and indefeasible provision can be secured to an unborn child. But, in the case of articles or covenants before marriage, for making a settlement upon the husband and wife, and their offspring, if there be a limitation to the parents for life, with a Remainder to the heirs of their bodies, the latter words are generally considered as words of purchase, and not of limitation: And a Court of Equity will decree the articles to be executed in strict settlement. See *Fearne* 124. and the examples there cited. It being the great object of such settlements to secure fortunes for the issue of the marriage, it would be useless to give the parents an estate-tail, of which they would almost immediately have the absolute disposal: And therefore the Courts of Equity will decree the estate to be settled upon the parent or parents for life; Remainder (*i. e.* upon the determination of such estate for life by forfeiture) to trustees, to support Contingent Remainders, for their lives; Remainder (after the decease of the parents) to the first and other sons successively in tail; with Remainder to all the daughters in tail, as tenants in common; with subsequent Remainders, or provisions, according to the occasions and intentions of the parties.

In these strict settlements, the estate is unalienable till the first son attains the age of twenty one; who, if his father is dead, has then, as tenant in tail, full power over the estate; or, if his father is living, the son can then bar his own issue by a fine, independent of the father. *Cruise* 161. See title *Fine*. But the father, and the son at that age, can cut off all the subsequent limitations, and dispose of the estate in any manner they please, by joining in a common recovery. See title *Recovery*, and *ante* II. This is the origin of the vulgar error, that a tenant of an estate-tail must have the consent of his eldest son to enable him to cut off the entail; for that is necessary where the father has only a life-estate, and his eldest son has the Remainder in tail.

But there is no method whatever of securing an estate to the grandchildren of a person who is without children at the time of the settlement; for the Law will not admit of a perpetuity: which has been defined to be "any extension of an estate beyond a life in being, and twenty-one years after." 2 *Bra. C. R.* 30. See this Dict. title *Exc-*

cutory Devise. Hence, where in a settlement, the father has a power to appoint an estate to or amongst his children, he cannot afterwards give this to his children in strict settlement, or give any of his sons an estate for life, with a Remainder in tail to his eldest son: for if he could do this, a perpetuity would be created by the original settlement. 2 *Term Rep.* 241. See 2 *Comm. c.* 11. *in n.*

From what has been imperfectly stated under this title, the student will observe how much nicety is required in creating and securing a Remainder; and in some measure, see the general reasons upon which this nicety is founded. It were endless to attempt to enter upon the particular subtilties and refinements into which this doctrine, by the variety of cases which have occurred in the course of many centuries, has been spun out and subdivided: It has been already hinted, (see *ante* IV.) that in devises by last will and testament, (which, being often drawn up when the party is *inops consilii*, are always more favoured in construction than formal deeds, which are presumed to be made with great caution, fore-thought, and advice,) Remainders may be created, in some measure, contrary to the rules laid down: though Lawyers will not allow such dispositions to be strictly Remainders; but call them by another name, that of *Executory Devises*, or devises hereafter to be executed; as to which see further, this Dict. under that title.

For more information on this subject, see 4 *New Abr.: Vin. Abr.* title *Remainder*: this Dict. titles *Executory Devise*; *Recovery*: and, for a clear and comprehensive statement of this abstruse branch of legal learning, *Fearne's* valuable *Essays on Contingent Remainders and Executory Devises*.

REMANENTES, *Remansi.*] Belonging to—*de hominibus sive tenentibus qui huic manerio remansi sunt. Domesday.*

REMEDY, *Remedium.*] The action or means given by Law for the recovery of a right; and it is a maxim of law, that *whenever the Law giveth any thing, it gives a Remedy for the same.*

REMEMBRANCERS, *Rememoratores.*] Formerly called *Clerks of the Remembrance*; Officers of the Exchequer, of which there are three, distinguished by the names of the King's Remembrancer, the Lord Treasurer's Remembrancer, and the Remembrancer of First Fruits: Upon whose charge it lies, to put the Lord Treasurer and the Justices of that Court in Remembrance of such things as are to be called on and dealt in for the King's benefit.

The King's Remembrancer enters in his office all recognizances taken before the Barons for any of the King's debts, for appearances, &c.; and he takes all bonds for such debts, and makes out process for breach of them; also he writes process against the Collectors of Customs, Subsidies, Excise, and other public payments for their accounts: All informations on Penal Statutes are entered and sued in his office; and he makes the bills of composition on Penal Laws, and takes the instalment of debts: And all matters of *English* bills in the Exchequer-Chamber remain in the office of this Remembrancer. He has delivered into his office the indentures, fines, and other evidences, which concern the passing any lands to or from the King. In *Crastino Animarum*, yearly, he reads in the Court the oath of all the Officers of the Court, when they are admitted. Writs of Prerogative, or Privileges, for Officers and Ministers of the Court, are made out by him; and commissions of *Nisi Prius*, by the King's warrant, on trial

of any matters within his office: At the assises in the country, he hath the entering of judgments, of pleas, &c. And all differences touching irregularities in proceedings shall be determined by the King's Remembrancer; who is to settle the same, if he can, and give costs where he finds the fault; but, if not, the Court is to determine it, &c.

By order of Court, his Majesty's Remembrancer, or his deputy, are diligently to attend in Court, and to give an account touching any proceedings as they shall be required; and they enter the rules and orders of the Court.

The Treasurer's Remembrancer issues out process of *Fieri Facias* and Extents, for debts to the King; and against Sheriffs, Escheators, &c. not accounting. He takes the accounts of all Sheriffs, and makes the record, whereby it appears whether Sheriffs, and other Accountants, pay their *profers* due at *Easter* and *Michaelmas*; and he makes another record, whether Sheriffs, and other Accountants, keep their days prefixed: There are also brought into his office all the accounts of customers, controllers, and accountants, to make entry thereof on record. All estreats of fines, issues, and amerciaments, set in any of the Courts at *Westminster*, or at the Assises, or Sessions, are certified into his office; and by him delivered to the Clerk of the Estreats, to make out process on them; and he may issue process for discovery of tenures; and all such revenue as is due to the Crown by reason thereof, &c.

The Remembrancer of the First Fruits' Office is to take all compositions, and bonds for payments of First Fruits and Tenths; he makes process against all such persons as do not pay the same. *Stats. 5 R. 2. st. 1. c. 14: 37 Ed. 3. c. 4.*

REMISSION, A pardon from the King, and passed under the Great Seal: the taking of which is a confessing the fault, *Scotch Law Dict.* These Remissions do not prevent a private party from pursuing for damages. See title *Pardon*.

REMITTER, from the Lat. *remittere*, to restore, or send back. An operation in Law; upon the meeting of an antient right, remediable, and a latter (defeasible) estate, in the same person; (the latter being cast upon him by Law;) whereby the antient right is restored and set up again; and the new defeasible estate ceased; and thus he is in, of his first or better estate. See 1 *Inst.* 347, *b*: *Litt.* § 659.

Remitter is classed (with *Retainer*), by *Blackstone*, among those remedies for private wrongs which are effected by the mere operation of Law; and is defined to be, where he who hath the true property, or *jus proprietatis*, in lands, but is out of possession thereof, and hath no right to enter, without recovering possession in an action, hath afterwards the freehold cast upon him by some subsequent, and, of course, defective title: In this case, he is remitted, or sent back, by operation of Law, to his antient and more certain title. The right of entry, which he hath gained by a bad title, shall be *ipso facto* annexed to his own inherent good one; and his defeasible estate shall be utterly defeated and annulled, by the instantaneous act of Law, without his participation or consent. *Litt.* § 659: *Co. Litt.* 358: *Cro. Jac.* 489. As if *A.* disseises *B.*, that is, turns him out of possession, and dies, leaving a son *C.*; hereby the estate descends to *C.* the son of *A.*, and *B.* is barred from entering thereon till he proves his right in an action: Now, if afterwards *C.*, the heir of the disseisor, makes a lease for life to *D.*, with remainder to *B.* the disseisee for life, and *D.*

dies; hereby the remainder accrues to *B.*, the disseisee; who, thus gaining a new freehold by virtue of the remainder, which is a bad title, is by act of Law *remitted*, or in, of his former and surer estate. For he hath hereby gained a new right of possession, to which the Law immediately annexes his antient right of property. *Finch. L.* 194: *Litt.* § 683.

If the subsequent estate, or right of possession, be gained by a man's own act or consent, as by immediate purchase, being of full age, he shall not be remitted; for the taking such subsequent estate was his own folly, and shall be looked upon as a waiver of his prior right. *Co. Litt.* 348. 350. Therefore, it is to be observed, that to every Remitter there are regularly these incidents; an antient right, and a new defeasible estate of freehold, uniting in one and the same person; which defeasible estate must be *cast upon* the tenant, not gained by his own act, or folly. The reason given by *Littleton*, why this remedy, which operates silently, and by the mere act of Law, was allowed, is because, otherwise, he who hath right would be deprived of all remedy. *Litt.* § 661.

The above distinctions may seem superfluous to an hasty observer, who perhaps would imagine, that since the tenant hath now both the right, and also the possession, it little signifies by what means such possession shall be said to be gained. But the wisdom of our antient Law determined nothing in vain. As the tenant's possession was gained by a defective title, it was liable to be overturned by shewing that defect, in a Writ of Entry; and then he must have been driven to his Writ of Right to recover his just inheritance; which would have been doubly hard, because, during the time he was himself tenant, he could not establish his prior title by any possessory action. The Law, therefore, remits him to his prior title, or puts him in the same condition as if he had recovered the land by writ of entry. Without the Remitter, he would have had *jus et seisinam* separate; a good right, but a bad possession: Now, by the Remitter, he hath the most perfect of all titles, *juris et seisinæ conjunctionem*. 3 *Comm. c.* 10. *p.* 190.

There shall be no Remitter to a right, for which the party has no remedy by action: as if the issue in tail be barred by the fine or warranty of his ancestor, and the freehold is afterwards cast upon him; he shall not be remitted to his estate-tail: for the operation of the Remitter is exactly the same, after the union of the two rights, as that of a real action would have been, before it. As then, the issue in tail could not, by any action, have recovered his antient estate, he shall not recover it by Remitter. See *Co. Litt.* 349: *Moor* 115: 1 *And.* 286: 3 *Comm.* 19: and 1 *Inst.* 347, *a. in n.*

There are different degrees of title which a person, disseising another of his lands, acquires in them, in the eye of the Law, independently of any anterior right. Thus, if *A.* is disseised by *B.*, while the possession is in *B.*, it is a mere naked possession, unsupported by any right, and *A.* may restore his possession, and put a total end to the possession of *B.*, by an entry on the land, without any previous action: but, if *B.* die, the possession descends on his heir, by act of Law: In this case, the heir comes to possession of the land by a lawful title, and acquires, in the eye of the Law, an apparent right of possession; which is so far good against the person disseised, that he has lost his right to recover the possession by entry, and can only recover it by an action at Law. The actions used in these cases are called Possessory

Actions. But if *A.* permits the possession to be withheld from him, beyond a certain period of time, without claiming it, or suffers judgment in a possessory action to be given against him by default; or if, being tenant in tail, he makes a discontinuance; in all these cases *B.*'s title is strengthened, and *A.* can no longer recover by a possessory action, and his only remedy then is by an action on the right: These last actions are called *Droiturel* Actions, and are the ultimate resource of the person disseised. Now if, in any of these three stages of the adverse title, the disseisee, without any fault in him, comes to the possession of the estate by a defeasible title, he is considered to be in, not as of his new right, but as of his antient and better right; and, consequently, the right of the person, who supposing the disseisee still to be in as of his defeasible estate, would be entitled to the lands upon the cession or determination of that estate, is gone for ever. In these circumstances, the disseisee is said to be remitted to his antient estate: the principal reason whereof is, as has already been stated, that the person so remitted cannot sue or enter upon himself; so that in those cases where the possession is recoverable by entry, the Remitter has the effect of an entry; and in those cases where it is recoverable by action, it has the effect of a judgment at Law: But since there is no Remitter where he who comes to the defeasible estate, comes to it by his own act, or his own assent; hence the defeasible estate, to entitle the party to be remitted, must be made to him or her, during infancy or coverture, or must come to them by descent, or act of Law: Neither is there any Remitter where the antient estate is not recoverable either by action or by entry. So that in those cases where the disseisee is beyond the three stages just alluded to, if he afterwards come to the estate by a defeasible title, he remains seised as of that estate, and is not remitted to his more antient title. 1 *Inst.* 347, *b. in n.* See title *Release* I.

These are the doctrines of the Common Law respecting Remitter: But they are greatly altered by *stat. 27 H. 8. c. 10*: that statute executes the possession to the party in the same plight, manner, and form, as the use was limited to him. It operates only with respect to the first taker, and therefore the issue of the issue is remitted. By *stat. 32 H. 8. c. 28. § 6.* it is enacted, that no fine, feoffment, or other act by the husband alone, of the wife's lands, shall be any discontinuance; but that the wife, and her heirs, and such others to whom the right shall appertain after her decease, shall, notwithstanding such fine, or other act, lawfully enter into her lands, according to their rights and titles therein. This takes from the wife, and those claiming under her, the effect of *stat. 27 H. 8*; so that she has her election to take by *stat. 27 H. 8.* or enter by *stat. 32 H. 8.* upon which she shall be remitted. See *Duncombe v. Wingfield*, *Hob.* 254: 1 *Inst.* 347, *b. in n.*

The reason of this invention of the Law is *in favour of right*; and that title which is first, and most antient, is always preferred. *Dyer* 68: *Finch's Law* 119.

In Remitters to restore rights, the first interest which works such Remitter, must be a right, and not a title of entry; and there can be no Remitter before an entry. *Co. Litt.* 348: 2 *Bulst.* 29.

A Remitter must be to a precedent right; for regularly to every Remitter there are two incidents, *viz. an antient right and a defeasi-*

ble estate of freehold coming together. Doct. & Stud. c. 9: Wood's Inst. 528.

Tenant in tail makes a feoffment in fee, on condition, and dieth; and his issue being within age, enters for the condition broken, by virtue of the feoffment; he shall be first in as tenant in fee-simple, and be remitted as heir to his father: But, if the heir be of age, he shall not be remitted; but is to bring his writ of *formedon* against the feoffee. *Co. Lit.* 202. 349. And if tenant in tail infeoff his son, or heir apparent, who is within age, and after dies, that is a Remitter to the heir, though if he were at full age at the time of such feoffment, it is no Remitter, because it was his folly, that, being of full age, would take such a feoffment. *Lit.* 655.

If a husband alien lands which he hath in right of his wife, and after take an estate again to him and his wife, for their lives, this is a Remitter to the wife; for the alienation is the act of the husband, and not of the woman; yet if the alienation be by fine in a Court of Record, such a taking again afterwards to the husband and wife shall not make the wife to be in by her Remitter, she being excluded by the fine for ever. *Terms de Ley.*

Lands are given to a man and his wife, and the heirs of their two bodies; and after the husband aliens the land in fee, and then takes back an estate to him, and his wife, for their lives; here they will both be remitted: But if he take an estate again to himself for life, Remitter will not be allowed against his own alienation. *Co. Lit.* 354.

When the entry of a person is lawful, and he takes an estate in the land for life, or in fee, &c. (except it be by matter of record, or otherwise to conclude or estop him,) he shall be remitted. *Co. Lit.* 363. And a Remitter to one in possession, may be a Remitter to another in remainder; if the remainder be not bound, which estops it. *Cro. Car.* 145.

If there be tenant in tail, remainder in fee to *A. B.*, and the tenant in tail discontinueth, and takes back an estate in fee; and then devises the lands to his wife for life, with remainder to *W. R.* for years, remainder to the same *A. B.* in fee, and dies, and his wife enters, and dies: It has been held, that he in remainder in fee may enter, and avoid the term for years to *W. R.*, because he is remitted to his first remainder in fee; and a Remitter avoids a lease for years, without entry. *Noy* 48.

A father was tenant for life, remainder to his son for life, remainder to the right heirs of the body of the father; he and his son conveyed the lands to the uncle in fee, who died without issue; so that the son, who was heir in tail to the father, was now heir at law to the uncle, and the fee descended on him; the wife of the uncle brought dower, but the son being remitted to his former estate, no dower accrued to the wife, for the estate of which she claims dower is gone. *1 Leon.* 37: *9 Rep.* 136.

Lands were purchased by a man, and settled on himself and his wife in tail, and they had issue two sons; then he made a feoffment to the use of himself for life, remainder to the wife for life, remainder in fee to his second son: The wife, after his death, entered, and made a feoffment to the issue of the second son; and then the eldest son entered for a forfeiture, on the *stat. 11 H. 7. c. 20*: and it was adjudged a forfeiture, by reason the wife having two titles, one as tenant in tail, the other as tenant for life; by her entry she is remitted to her

estate for life, so that the feoffment made by her is a forfeiture of her estate. *Sid.* 63; 3 *Nels. Abr.* 100.

If land be given to a woman in tail, the remainder to another and a third in tail, remainder to a fourth in fee; the feme takes husband, and he discontinues the lands in fee, and after an estate is made to the husband and wife for their lives, or other estate: This is a Remitter to all in Remainder, and, if she die without issue, they may enter; and so it is of them who have the reversion after such intails. *Lit.* § 673.

Where a person lets land for term of life to another, who granteth it away in fee; if the alienee make an estate to the lessor, it will be a Remitter to him, because his entry is lawful. *Lit.* § 694.

If one be disseised, and the disseisor makes a feoffment to the disseisee; in this case, the disseisee may be remitted to his elder title, or he may choose to take by the feoffment; and if it be with warranty, he may, if he will, make use of the warranty. 1 *H. 7. c.* 20; 3 *Sheff. Abr.* 237.

Tenant in tail hath two sons, and leases the land intailed to his elder son for life, remainder to his younger son; 'it is no Remitter to the eldest: But, if he die without issue of his body, the youngest son shall be remitted. *Lit.* § 682.

If tenant in tail make a feoffment to the use of himself and his heirs, he shall not be remitted; but his issue shall. 3 *Nels.* 100. On Remitter of issue in tail, leases, and other charges on the lands, are avoided. *Lit.* §§ 659, 660.

For more learning on this subject, see 18 *Vin. Abr.* title *Remitter*.

REMITTITUR; In cases of appeal, the Record itself, or a transcript thereof, is sent from the Court of *B. R.* to the Exchequer-Chamber, or House of Lords: When judgment is given in the superior Court, or the Writ of Error abates, or is discontinued, the record or transcript is returned (*Remittitur*, sent back) to the Court of *K. B.*, and the entry of this circumstance is termed a *Remittitur*. See *Tidd's* and *Sellon's Pract.*

There is also a *Remittitur* or Release of *Damages*. See title *Damages* II.

REMOVAL OF THE POOR. See title *Poor* VI.

REMOVER, Is where a suit or cause is removed out of one Court into another; and for this there are divers writs and means. 11 *Reft.* 41. Remanding of a cause, is sending it back into the same Court, out of which it was called and sent for. *March* 106. See titles *Appeal*; *Habeas Corpus*.

RENANT, Or rather *reniant*, i. e. *negans*, denying; from the Fr. *renier*, *negare*, to deny or refuse. 32 *H. 8. c.* 2.

RENCOUNTER, a sudden meeting, as opposed to a duel which is deliberate. See title *Homicide*.

RENDER, Fr. *rendre*, *reddere*.] To yield, give again, or return.

This word is used in levying a fine, which is either single, where nothing is rendered back by the cognizee; or double, when it contains a grant and render back again of the land, &c. to the cognisor. *West's Symb.* See title *Fine of Lands*.

There are certain things in a manor which lie in *prender*, that is, which may be *taken* by the lord or his officers when they happen, without any offer made by the tenant, such as escheats, &c.; and certain which lie in *Render*, i. e. must be rendered or answered by the

estate for life, so that the feoffment made by her is a forfeiture of her estate. *Sid.* 63; 3 *Nels. Abr.* 100.

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This word is used in levying a fine, which is either single, where nothing is rendered back by the cognizee; or double, when it contains a grant and render back again of the land, &c. to the cognisor. *West's Symb.* See title *Fine of Lands*.

There are certain things in a manor which lie in *prender*, that is, which may be *taken* by the lord or his officers when they happen, without any offer made by the tenant, such as escheats, &c.; and certain which lie in *Render*, i. e. must be rendered or answered by the

tenant, as rents, heriots, and other services: Also some services consist in seissance; and some in render. *West. Symb. par. 2: Perkin's Res.* 696.

RENOVANT, From *renovare*, to renew, or make again.] A parson sued one for tithes, to be paid of things *renovant*, &c. *Cro. Jac.* 430. See title *Tithes*.

TO RENOUNCE, To give up a right. See *Renunciation*.

RENT.

REDDITUS.] Said to be from *redeundo*, because, *Retrait & quotannis reddit. Fleta, lib. 3. c. 14*: Rather à *reddendo*, from its being rendered. See *post.*; and title *Deed*. A sum of money, or other consideration, issuing yearly out of lands or tenements. *Plowd.* 132. 138. 141. Generally taken as the consideration payable by a tenant for lands or tenements held under a Lease or Demise.

Rents are classed, by *Blackstone*, among incorporeal hereditaments. The word Rent or Render, *redditus*, according to him, signifies a compensation or *return*, it being in the nature of an acknowledgment, given for the possession of some corporeal inheritance. See 1 *Inst.* 144. It is defined to be a certain profit issuing yearly out of lands and tenements corporeal. It must be a *profit*; yet there is no occasion for it to be, as it usually is, a sum of money; for spurs, capons, horses, corn, and other matters may be rendered, and frequently are rendered, by way of Rent. *Co. Litt.* 142. It may also consist in services or manual operations; as, to plough so many acres of ground, to attend the King or the lord to the wars, and the like; which services, in the eye of the Law, are profits. This profit must also be *certain*; or that which may be reduced to a certainty by either party. It must also issue *yearly*; though there is no occasion for it to issue every successive year; but it may be reserved every second, third, or fourth year: yet as it is to be produced out of the profits of lands and tenements as a recompence for being permitted to hold or enjoy them, it ought to be reserved yearly, because those profits do annually arise, and are annually renewed. It must *issue out* of the thing granted, and not be part of the land or thing itself; wherein it differs from an exception in the grant, which is always of part of the thing granted. *Plowd.* 13: 8 *Repl.* 71. It must, lastly, issue out of *lands and tenements corporeal*; that is, from some inheritance whereunto the owner or grantee of the Rent may have recourse to distrain. Therefore, a Rent, strictly speaking, cannot be reserved out of an advowson, a common, an office, a franchise, or the like; but a grant of such annuity or sum (*e. g.* by a lessee of tithes, or other incorporeal hereditament) may operate as a personal contract, and oblige the grantor to pay the money reserved, or subject him to an action of debt for the amount of the Rent agreed upon; though it doth not affect the inheritance, and is no legal Rent in contemplation of Law. 1 *Inst.* 47. 144. See 2 *Woodd.* 69. and *post.* II. *ad fin.* And the King might always reserve a Rent out of incorporeal hereditaments: the reason of which is, that he, by his prerogative, can distrain on all the lands of his lessee. 1 *Inst.* 47. *a. in n.*

I. *Of the Nature and Properties of the several Sorts of Rent.*

II. *Statutes concerning Rent: and of the Remedies for Recovery thereof: See also title Distress; Sufferance; Ejectment.*

III. *In what Cases a Demand of Rent is necessary.*

IV. *Of the Time of demanding Rent, and the Place where the Demand is to be made.*

I. THERE are, at Common Law, three manner of Rents; Rent-service, Rent-charge, and Rent-seck. *Lit.* § 213.

Rent-service is so called, because it hath some corporeal service incident to it; as, at the least, fealty, or the feudal oath of fidelity. 1 *Inst.* 142. For, if a tenant holds his lands by fealty, and 10*s.* Rent; or by the service of ploughing the lord's land, and 5*s.* Rent; these pecuniary Rents, being connected with personal services, are therefore called Rent-service. And for these, in case they be behind, or arrere, at the day appointed, the lord may distrain of common right, without reserving any special power of distress; provided he hath in himself the reversion, or future estate of the lands and tenements, after the lease or particular estate of the lessee or grantee is expired. *Lit.* § 215.

The services are of two sorts, either expressed in the lease or contract, or raised by implication of Law. When the services are expressed in the contract, the *quantum* must be either certainly mentioned, or be such as, by reference to something else, may be reduced to a certainty; for if the lessor's demands be uncertain, it is impossible to give him an adequate satisfaction or compensation for them, as the Jury cannot determine what injury he has sustained. *Co. Lit.* 96, a: *Stil.* 397: 2 *Ld. Raym.* 1160.

The services implied are such as the Law obliges the tenant to perform when there are none contracted for in the grant; and these are more or less, according to the duration of the gift; as at Common Law, before the statute *Quia emptores terrarum*, if the tenant made a feoffment in fee without any reservation of services, the feoffee held by the same services by which the feoffor held over; because the services being an incumbrance on the land, which the tenant could not discharge without his lord's consent, must follow the land, into whose hands soever it comes. *Co. Litt.* 22, 23.

A *Rent-charge*, is where the owner of the Rent hath no future interest, or reversion expectant, in the land; as where a man, by deed, maketh over to others his *whole* estate in fee-simple, with a certain Rent payable thereout; and adds to the deed a covenant or clause of distress, that if the Rent be arrere, or behind, it shall be lawful to distrain for the same. In this case, the land is liable to the distress, not of common right, but by virtue of the clause in the deed: and therefore it is called a *Rent-charge*, because in this manner, the land is charged with a distress for the payment of it. 1 *Inst.* 143.

A clear Rent-charge must be free from the land-tax. *Doug.* 602.

Where a man, seised of lands, grants by deed-poll, or indenture, a yearly rent to be issuing out of the same land, to another in fee, in tail, for life or years, with a clause of distress; this is a Rent-charge, because the lands are charged with a distress by the express grant or provision of the parties, which otherwise it would not be. So, if a man make a feoffment in fee, reserving Rent, and if the Rent be behind, that it shall be lawful for him to distrain; this is a Rent-charge, the word *reserving* amounting to a grant from the feoffee. *Litt.* § 217: *Co. Litt.* 170, a: *Plowd.* 134.

A Rent granted for equality of partition by one coparcener to another, is a Rent-charge, and distrainable of common right, without clause of distress; and although there be no tenure of the sister who grants it; for as the Law, for the conveniency of coparceners, allows

of such grants, it must consequently give a remedy to the grantee for recovery of it. *Lit.* § 252.

An *Annuity* is a thing very distinct from a Rent-charge, with which it is frequently confounded: A Rent-charge being a burden imposed upon and issuing out of *lands*; whereas an annuity is a yearly sum chargeable only upon the *person* of the grantor. Therefore if a man by deed grant to another the sum of 20*l.* *per annum*, without expressing out of what lands it shall issue, no land at all shall be charged with it; but it is a mere personal annuity; which is of so little account in the law, that, if granted to an eleemosynary corporation, it is not within the Statutes of Mortmain; and yet a man may have a real estate in it, though his security is merely personal. 2 *Comm. c.* 3. See 1 *Inst.* 144.

Rent-seck, *redditus siccus*, or barren Rent is in effect nothing more than a Rent reserved by deed, but without any clause of distress.

A Rent-seck is so called, because *it is unprofitable to the grantee*; as, before seisin had, he can have no remedy for recovery of it; as where a man seised in fee grants a Rent in fee for life or years, or where a man makes a feoffment in fee or for life, remainder in fee, reserving Rent, *without any clause of distress*, these are Rents-seck; for which, by the policy of the antient Law, there was no remedy, as there was no tenure between the grantor and grantee, or feoffor and feoffee; consequently, no fealty could be due. *Lit.* § 215. 218: *Cro. Car.* 520: *Kelw.* 104: *Cro. Eliz.* 656.

And it hath been ruled in equity, where an annuity was devised by will to *A.*, and the land subject to the annuity, to *B.*, that *B.* should give seisin of the Rent-seck to *A.*, that he might have remedy for recovery of it at Common Law; it being the original intention of the gift, that the devisee should have some benefit from it. *Moor* 626: 3 *Chan. Ca.* 92.

So, when a bill was brought for 3*l.*, for a Rent of 5*s.* arrear for twelve years, the equity of the bill being that the deeds by which the Rent was created were lost, consequently no remedy for the Rent at Law; the Court, on the plaintiff's proving constant payment till the last twelve years, decreed the defendant to pay the arrears and growing Rent; for since, by payment it was evident the plaintiff had a right to the Rent, and that he could not, without his deeds, make a title at Law; therefore the Court decreed the defendant to pay the Rent, and so *subjected his person*, which possibly might not have been liable by the deed which created the Rent. 1 *Chan. Ca.* 120. This was previous to *stat. 4 Geo. 2. c.* 28. See *post.* II.

Though a Rent is an incorporeal hereditament, it is susceptible of the same limitations as other hereditaments. Hence it may be granted or devised for life, or in tail, with remainders or limitations over. But there is this difference between an intail of lands, and an intail of Rent; that the tenant in tail of lands, with the immediate reversion in fee in the donor, may, by a common recovery, bar the intail and the reversion: See title *Recovery*. Whereas the grantee in tail of a Rent *de novo*, without a subsequent limitation of it in fee, acquires, by a common recovery only a base fee, determinable upon his decease, and failure of the issues in tail: but if there is a limitation of it in fee, after the limitation in tail, the Recovery of the tenant in tail gives him the fee-simple. This was resolved in the cases of

Smith v. Farnaby, *Carth.* 52: *Sid.* 385: 2 *Keb.* 29. 55. 84: *Weeks v. Peach*, *Lutw.* 1224: *Chaplin v. Chaplin*, 3 *P. Wms.* 229: 2 *Eq. Abr.* 384, 5.

The reason of this difference is, that it would be unjust that the conveyance of a grantee of a Rent, should give a longer duration or existence to the Rent, than it had in its original creation. It is true that the barring of an estate-tail in land, is equally contrary to the intention of the grantor. But a rent differs materially from land. The old principles of the feudal law looked upon every modification of landed property, which was considered to be against common right, with a very jealous eye. Now a Rent-charge was supposed to be against common right; the grantee of the Rent-charge being subject to no feudal services, and being a burden on the tenant who was to perform them. Upon this principle, the Law, in every instance, avoided giving, by implication, a continuation to the Rent, beyond the period expressly fixed for its continuance. Thus, if a tenant in tail of land die without issue, his wife is entitled to dower for her life out of the land, notwithstanding the failure of the issue; but the widow of a tenant in tail of Rent is not entitled to her dower against the donor. So, if a rent is granted to a man and his heirs, generally, and he dies without an heir, the Rent does not escheat, but sinks into the land. It is upon this principle, that, when there is not a limitation over in fee, a tenant in tail of Rent acquires by his Recovery no more than a base fee; as has been already stated: But if there is a limitation in fee; after the particular limitation in tail, the grantor has substantially limited the Rent in fee; and therefore it is doing him no injustice, that the Recovery should give the donee who suffers it an estate in fee-simple. 1 *Inst.* 298, *a.* in *n.*

The case of *Chaplin v. Chaplin* was, that Lady Hanby, the grandmother of *Porter Chaplin*, being seised in fee, conveyed certain lands, to the use and intent that the trustees, named in the deed, should receive and enjoy a Rent-charge of 30*l.* *per annum*, and to them and their heirs, with power to distrain for it, and to enter and hold the land on nonpayment for 40 days: and then the Rent was declared to be to the use of *Porter Chaplin* in tail; remainder to the use of the same person who had the land in fee. *P. C.* died, leaving issue, who married, and died without issue; and the question was, Whether the widow was entitled to dower in this Rent? and determined she was not. It is stated to have been afterwards disclosed to the Court, that the legal estate of the Rent in fee was in the trustees: but it is observable, that it was not necessary that any new matter should be adduced to disclose this to the Court, as it appeared on the face of the deed: for a conveyance to *A.* and his heirs, to the use and intent that *B.* and his heirs may receive a Rent out of the estate, gives *B.* the legal fee of the Rent: so that if it is afterwards declared that *B.* and his heirs are to stand seised of the Rent to uses, the intended *cestuis que use* take only trust or equitable estates. If, therefore, it is intended to limit a Rent in strict settlement, it is necessary to do it by way of grant at Common Law, to some person and his heirs, to the uses intended to be limited. This gives the grantee the mere seisin to the uses, and the uses declared upon it will be executed by the statute. See 1 *Inst.* 298, *a.* in *n.*

There are also other species of Rents, which are reducible to these

three. Rents of *Assize* are the certain established Rents of the freeholders and ancient copyholders of a manor, which cannot be departed from or varied. 2 *Inst.* 19. Those of the freeholders are frequently called Chief-Rents, *redditus capitales*; and both sorts are indifferently denominated Quit-Rents, *quieti redditus*; because thereby the tenant goes quit and free of all other services. When these payments were reserved in silver or white money, they were antiently called White-Rents, or *Blanch-farms*, *redditus albi*; in contradistinction to Rents reserved in work, grain, or baser money, which were called *redditus nigri*, or *Black Mail*. 2 *Inst.* 19. See those several titles. Rack-rent is only a Rent of the full value of the tenement, or near it. A *Fee-farm* Rent is a Rent-charge issuing out of an estate in fee; of at least one-fourth of the value of the lands, at the time of its reservation: for a grant of lands, reserving so considerable a Rent, is indeed only letting lands to farm in fee-simple, instead of the usual methods for life or years. 1 *Inst.* 143. It seems that the *quantum* of the Rent is not essential to create a fee-farm. See 1 *Inst.* 145, *b. n.* 5: And also, whether a fee-farm must necessarily be a Rent-charge; or may not also be a Rent-seck; and *Doug.* 605.

These are the general divisions of Rent; but the difference between them (in respect to the remedy for recovering them) is now totally abolished; and all persons may have the like remedy by distress for Rents-seck, Rents of Assise, and Chief-Rents, (if paid for three years within twenty years preceding the act, or if created since,) as in case of Rents reserved upon lease. *Stat. 4 Geo. 2. c. 28. § 5.*

II. By *stat. 32 Hen. 8. c. 37.* The executors or administrators of tenants in fee-simple, tenants in fee-tail, and tenants for term of life, of Rents-service, Rent-charges, Rents-seck, and Fee-farms, unto whom any such Rent or Fee-farm be due, shall have an action of debt for such arrears against the tenants, who ought to have paid in the life-time of their testator, or against their executors and administrators, and distrain for the arrears on the land charged with the payment, so long as the lands continue in the seisin or possession of the tenant in demesne, who ought to have paid the Rent or Fee-farm, or in the seisin or possession of any other person claiming only from the same tenant by purchase, gift, or descent, in like manner as their testator might have done. § 1.

This act shall not extend to any manor in *Wales*, whereof the inhabitants have used to pay to every lord, at his first entry, any sum of money for discharge of all duties and penalties wherewith the inhabitants were chargeable to any of the lord's ancestors. § 2.

If any man have, in right of his wife, any estate in Rents or Fee-farms, and the same be unpaid in the wife's life, the husband, after the death of his wife, his executors, and administrators, shall have action of debt for the arrears, or may distrain. § 3.

If any have any Rents or Fee-farms for term of life of any other person, and the Rent, &c. be unpaid in the life of such person, and after the said person doth die, he to whom the Rent or Fee-farm is due, his executors and administrators, shall have an action of debt, or distrain for the same. § 4.

The only clause in *stat. 12 Car. 2. c. 24.* for converting military into common socage tenures, which seems to affect Rents, is a proviso

(§ 5.) to preserve Rents certain, and to make the reliefs on them universally the same as on the death of tenant in common socage. 1 *Inst.* 162, *b.* in *n.*

By *stat. 8 Ann. cap. 14.* No goods, upon any tenements leased, shall be taken by any execution, unless the party, at whose suit the execution is sued out, shall, before the removal of such goods, pay to the landlord of the premises, or his bailiff, all money due for Rent for the premises; provided the arrears do not amount to more than one year's Rent: And in case the arrears shall exceed one year's Rent, then the party, paying the said landlord, or his bailiff, one year's Rent, may proceed to execute his judgment: and the sheriff is required to levy and pay to the plaintiff, as well the money paid for Rent, as the execution-money. § 1.

The Act contains a proviso to prevent prejudice to the Crown, in recovering and seizing debts, fines, and forfeitures. § 8. See *Ogilvy v. Wingate, Parl. Cas.*

Landlord dead, and, after execution executed, administration is granted to *A.*; he is not entitled to a year's Rent. 1 *Strange* 97.

The administrator of the landlord may have an action against the officer for taking the goods in execution and removing them from the premises before the landlord was paid a year's Rent. 1 *Strange* 212.

On motion on behalf of the landlord, the sheriff was ordered to pay him his year's Rent, without deducting poundage. 1 *Strange* 643.

This statute extends to the *immediate* landlord, and not to the ground landlord. 2 *Strange* 787. After the landlord had been paid a year's Rent on one execution, another execution came in, and he moved to be paid another year's Rent on the last execution, but was denied; for *the intent of the Act was only to continue a lien as to one year*, and to punish him for his *laches*, if he lets more run in arrear. 2 *Strange* 1024.

It shall be lawful for any person having Rent due on any lease for life, years, or at will, determined, to distrain for such arrears *after determination* of the leases: Provided, That such distress be made *within six calendar months after the determination of such lease*, and during the continuance of such landlord's title, and during the possession of the tenant from whom such arrear became due. *Stat. 8 Ann. c. 14.* §§ 6, 7. The above clauses were made to remedy the defect of the Common Law, under which the power of distress ceased with the tenure. 1 *Inst.* 162, *b.* in *n.*

By *stat. 4 Geo. 2. cap. 28.* In case any tenant for life or years, or other person who shall come into possession of any lands, &c. under or by collusion of such tenant, *wilfully hold over*, after the determination of such term, and *after demand made in writing, for delivering possession*, such person holding over shall pay double the yearly value of the lands, &c. so detained. § 1.

In all cases between landlord and tenant, on half a year's Rent being in arrear, the landlord having a right by Law to re-enter for non-payment, may, without any formal demand or re-entry, serve a declaration in ejectment; and in case of judgment or non-suit for not confessing lease, entry, and ouster, it shall appear that half a year's Rent was due before a declaration served, and no sufficient distress to be found, and that the lessor in ejectment had power to re-enter; the lessor in ejectment shall recover judgment. § 2. See title *Ejectment*.

Lessees, &c. filing a bill in equity, shall not have an injunction

against proceedings at law, unless they shall, within forty days after answer filed, bring into Court such money as the lessors in their answer shall swear to be in arrear, over and above all just allowances, and costs taxed, there to remain till the hearing of the cause, or to be paid to the lessors on good security, subject to the decree of the Court; and in case such bill shall be duly filed, and execution executed, the lessors shall be accountable for only so much as they shall really make of the premises from the time of their re-entry; and if the same shall happen to be less than the usual Rent reserved, the lessees shall not be restored to the possession until they shall make up the deficiency to the lessors. § 3.

If the tenant, at any time before trial, tender or pay into Court all arrears with costs, proceedings on ejectment shall cease. § 4.

Previous to the above statute the Courts, both of Law and Equity, had exercised a discretionary power of staying the lessor from proceeding at Law, in cases of forfeiture for non-payment of Rent, by compelling him to take the money really due to him. See *Andr.* 341: 2 *Salk.* 597: 8 *Mod.* 345: 10 *Mod.* 383: 2 *Vern.* 103: *Wils.* 75: 2 *Stra.* 900.

In debt for double the yearly value under *stat. 4 Geo. 2. c. 18.* the plaintiff, after stating a demise to the defendant's wife, and the subsequent intermarriage with the defendant, alleged in the first count a notice to quit, and demand of possession delivered to the defendant and his wife: and in the second count alleged a notice to quit and demand of possession delivered to the wife previous to the intermarriage: the Court of *C. P.* held that to support the second count the husband need not be joined for conformity, and that to sustain the action it was not necessary to have given a notice to the husband subsequent to the marriage. 1 *New Rep. C. P.* 174.

By *stat. 11 Geo. 2. c. 19.* It shall be lawful for the landlord, where the agreement is not by deed, to recover a reasonable satisfaction for the tenements occupied by defendants, in an action on the case, for the use and occupation of what was held; and if in evidence on the trial any parol demise or agreement, not by deed, whereon a certain Rent was reserved, shall appear, plaintiff may make use thereof as an evidence of the *quantum* of the damages. § 14.

Where any tenant for life dies before or on the day, on which any Rent was reserved, on any demise which determined on the death of such tenant for life, the executors or administrators of such tenant for life may, in an action on the case, recover of the under-tenants, if such tenant for life die on the day on which the same was made payable, the whole, or if before such a day, then a proportion of such Rent, according to the time such tenant for life lived of the last year, or quarter, or other time, in which the Rent was growing due; making all just allowances. § 15.

The above clause gives action on the case to executors of a lessor or landlord, being only tenant for his own life, where he dies before or on a Rent-day; and by his death the lease or demise determines: In which case the lessee or under-tenant, by the Common Law, might have avoided paying any Rent. 1 *Inst.* 162, *b.* in *n.*

If any tenant holding tenements at a Rack-rent, or where the Rent reserved be full three-fourths of the yearly value of the premises, who shall be in arrear for one year's Rent, desert the premises, and leave the same uncultivated or unoccupied, so as no sufficient dis-

treas can be had to countervail the arrears; it shall be lawful for two Justices of the Peace (having no interest in the premises) to go upon and view the same, and to affix, on the most notorious part, notice in writing, what day (at the distance of fourteen days at least) they will return to take a second view; and if, on such second view, the tenant, or some person on his behalf, shall not appear and pay the Rent in arrear, or there shall not be sufficient distress on the premises, the Justices may put the landlord in possession, and the lease to such tenants as to any demise therein contained only, shall become void. § 16.

In case any tenant give notice of his intention to quit, and shall not accordingly deliver up the possession at the time in such notice contained, the tenant, his executors or administrators, shall pay to the landlord *double the Rent* which he should otherwise have paid. § 18.

The general remedy for *Rent* is by distress, under the restrictions and directions of the foregoing statutes; and, as to which, see further at length this Dict. title *Distress*: But there are also other remedies particularised by *Blackstone*, 3 *Comm. c.* 15. which it will be sufficient here to notice in a summary manner; as they are treated of under the several titles in this Dictionary.

By action of *Debt*, for the breach of the express contract. This is the most usual remedy, when recourse is had to any action at all for the recovery of pecuniary Rents: to which species of render, almost all free services are now reduced since the abolition of the military tenures: But for a freehold Rent, reserved on a lease for life, &c. no action of *Debt* lay, by the Common Law, during the continuance of the freehold, out of which it issued; for the Law would not suffer a *real* injury to be remedied by an action that was merely personal. 1 *Roll. Abr.* 595. But by *stat.* 8 *Ann. c.* 14. § 4. an action of *Debt* is given for Rents on leases for life or lives, as upon a lease for years: And by *stat.* 5 *Geo. 3. c.* 17. which enables ecclesiastical persons to lease tithes and other incorporeal inheritances, action of debt is given (by § 3.) for recovery of Rent on such leases; and perhaps the first of these statutes extends to leases of incorporeal hereditaments: See 1 *Inst.* 47, *a.* in *n.*

An assise of *mort d'ancestor*, or novel *disseisin*, will lie of Rents, as well as of lands; if the lord for the sake of trying the possessory right, will make it his election to suppose himself ousted or disseised thereof. This is now seldom heard of; and all other real actions to recover Rent, being in the nature of writs of right, and therefore more dilatory in their progress, are entirely disused, though not formally abolished, by Law.—Such are the writ *de consuetudinibus & Servitiis*; the writ of *Cessavit*; and the writ of right *sur Disclaimer*: As to which, see this Dict. under those titles; and see also title *Gavellet*. On the other hand, the writ of *Ne injuste vexes*; (see that title;) and the writ of *Mesne*, (see *Mean*;) are remedies for the tenant against the oppression of the lord.

The rent in a lease must be reserved to the lessor, or his heirs, &c. and not to a stranger. See 1 *Inst.* 213, *b.* The principle which gave rise to this rule is, that Rent is considered as a retribution for the land, and is therefore payable to those who would otherwise have had the land. It is to be observed, that remainder-men in a settlement, being at first view neither feoffors, donors, lessors, nor the heirs of feoffors,

donors, or lessors, there seems to have been, for some time after the statute of Uses, a doubt whether the Rents of leases, made by virtue of powers contained in settlements, could be reserved to them. In *Chudleigh's case*, 1 *Rep.* 159. it is positively said, that if a feoffment in fee be made to the use of one for life, remainder to another in tail, with several remainders over, with a power to the tenant for life to make leases, reserving the Rent to the reversioners, and the tenant for life accordingly make leases; neither his heirs, nor any of the remainder-men, shall have the Rent. But, in *Harcourt v. Pole*, 1 *Anders.* 273. it was adjudged, that the remainder-men might distrain in these cases: And in *T. Jones* 35. the dictum in *Chudleigh's case* is denied to be Law. The determination in *Harcourt v. Pole* will appear incontrovertibly right, if we consider that both the lessees and remainder-men derive their estate out of the reversion or original inheritance of the settler; and therefore the Law, to use *Coke's* expression in *Whitlock's case*, 8 *Rep.* 71. will distribute the Rent to every one to whom any limitation of the use is made. 1 *Inst.* 214, *a.* in *n.*; and see *Id.* 213, *b.* in *n.*

III. MANY of the decisions under this and the following division are, by reason of the statute remedies against non-payment of Rent, become of less consequence than they were at the time of their determination, but seem still worthy of being preferred; as shewing, in some measure, the evils remedied by those statutes.

With respect to the necessity of *demanding Rent*, there is a material difference between a remedy by re-entry, and a remedy by distress, for non-payment of the Rent; for where the remedy is by way of re-entry, for non-payment, there must be an *actual demand* made, previous to the entry, otherwise it is tortious; because such condition of re-entry, is in derogation of the grant, and the estate at Law being once defeated, is not to be restored by any subsequent payment: and it is presumed, that the tenant is there residing on the premises, in order to pay the Rent for preservation of his estate, unless the contrary appears by the lessor's being there to demand it: Therefore, unless there be a demand made, and the tenant thereby, contrary to the presumption, appears not to be on the land ready to pay the Rent, the Law will not give the lessor the benefit of re-entry, to defeat the tenant's estate, without a wilful default in him; which cannot appear without a demand hath been actually made on the land. *Co. Litt.* 201, *b.* *Hob.* 207. 331: 5 *Co.* 56: *Dy.* 51: *Plowd.* 70: 7 *Co.* 56: *Vaugh.* 32. This was at Common Law; but now see the *stat.* 4 *Geo.* 2. *c.* 28. §2: *ante Div.* II.; and this Dict. title *Re-entry*.

So, if there had been a *nomine pæna* given to the lessor for non-payment, the lessor must demand the Rent before he can be entitled to the penalty. *Hut.* 114: *Hob.* 207. 331: 7 *Co.* 56.

Where the remedy for recovery of Rent is by distress, there needs no demand previous to the distress; though the deed says, that if the Rent be behind, being lawfully demanded, that the lessor may distrain; but the lessor, notwithstanding such clause, may distrain when the Rent becomes due. So it is, if a Rent-charge be granted to *A.*, and if it be behind, being lawfully demanded, that then *A.* shall distrain; he may distrain without any previous demand, because this remedy is not in destruction of the estate, for the distress is only a pledge for payment of it, and the taking a distress is a legal demand

of the tenant to pay the Rent, which was all that was required by the deed; and the tenant is not injured by the taking of the distress, because, on tender of the Rent, the pledges are immediately to be restored, or a writ of detinue lies after the *quantum* of the Rent has been settled in the replevin; whereas in the case of re-entry; or of a penalty, the tenant is really injured, either by loss of his estate, or the payment of a greater sum than the Rent, which cannot be restored on payment of the Rent; therefore he shall not be punished in such cases without a wilful default in him, which cannot otherwise appear than by the proof of a demand, which was not answered by the tenant. *Hob.* 207: *Hut.* 13. 23: *Moor* 883: 2 *Roll. Abr.* 426.

But this general distinction must be understood with these restrictions:

That if the King makes a lease, reserving Rent, with a clause of re-entry for non-payment, he is not obliged to make any demand previous to his re-entry; but the tenant is obliged to pay his Rent for the preservation of his estate, because it is beneath the king to attend his subject to demand his Rent. 4 *Co.* 73: 5 *Co.* 56: *Latch.* 28: *Moor* 152: *Dyer* 87, 88.

But this exception is not to be extended to the Duchy lands, though they be in the hands of the King, for the King must make a demand before he can re-enter into such lands; but this is by the *stat.* 1 *H.* 4. c. 18. which provides, that, when the Duchy lands come to the King they shall not be under such government and regulations as the demesnes and possessions belonging to the Crown. *Moor* 149. 160.

So, if a prebendary make a lease, rendering Rent, and if the rent be in arrear and demanded, that it shall be lawful for the prebendary to re-enter; if the reversion in this case comes to the King, the King must in this case demand the Rent, though he shall be by his prerogative excused of an implied demand; for the implied demand is the act of the Law, the other, the express agreement of the parties, which the King's prerogative shall not defeat. Therefore, in case of the King, if he makes a lease, reserving rent, with a proviso, that if the rent be in arrear for such a time, (being lawfully demanded, or demanded in due form,) that then the lease shall be void; it seems that not only the patentee of the reversion in this case, but also the King himself, whilst he continues the reversion in his own hands, is obliged to make an actual demand by reason of the express agreement for that purpose. *Dyer* 87. 210.

But if the King, in cases where he need not make a demand, assigns over the reversion, the patentee cannot enter for non-payment, without a previous demand, because the privilege is inseparably annexed to the person of the King. 4 *Co.* 73: *Moor* 404: *Cro. Eliz.* 462: *Dyer* 87.

Another exception is, where the Rent is payable *at a place off the land*, with a clause that if the rent be behind, being lawfully demanded *at the place off the land*, or where the clause is, that if the Rent be behind, being lawfully demanded of the person who is to pay it, that then he may distrain; in these cases, though the remedy be by distress only, yet the grantee cannot distrain without a previous demand: because here the distress and demand being not complicate, but different acts, to be performed at different places and times, the demand must be previous to the distress; for distress is an act of grace, not of common right, and therefore must be used in the manner that

it is given. *Hob.* 208: 2 *Roll. Abr.* 426: *Moor* 83: *Brownl.* 171: But see *Hutt.* 23. *contra.*

But where the clause is no more than that, if the Rent be behind, being lawfully demanded, (without saying at any place off the land, or of the person of the grantor,) that then the grantee may distrain, there needs no actual demand; because here the distress and demand is but one complicate act, the one included in the other, and all done at one time and place, *viz.* on the land; for the distress is in itself a lawful demand, therefore needs no actual demand previous to it; because all that was required by the deed was a lawful demand, which the distress in its own nature is. 2 *Roll. Abr.* 426: *Hob.* 208: and see *Dyer* 348.

And there seems to have been formerly another exception admitted, that where the remedy was by way of *entry for non-payment*, that yet there needed no demand, if the rent were made payable at any place off the land; because they looked on the money payable off the land to be in nature of a sum *in gross*, which the tenant had at his own peril undertaken to pay; but this opinion has been entirely exploded, for *the place of payment does not change the nature of the service*, but it remains in its nature a Rent, as much as if it had been made payable on the land; therefore the presumption is, that the tenant was *there* to pay it, unless it be overthrown by the proof of a demand; and without such demand, and a neglect or refusal, there is no injury to the lessor, consequently the estate of the lessee ought not to be defeated. *Plowd.* 70: 4 *Co.* 73: *Moor* 408. 598: *Cro. Eliz.* 415. 435. 536.

But when the power of re-entry is given to the lessor for non-payment, without any further demand, there it seems that the lessee has undertaken to pay it, whether it be demanded or not; and there can be no presumption in his favour in this case; because by dispensing with the demand, he has put himself under the necessity of making an actual proof that he was ready to tender and pay the Rent. *Dyer* 68.

There is another exception when the remedy is by distress, and that is, when the tenant was ready on the land to pay the Rent at the day, and made a tender of it; there it seems there must be a demand previous to the distress; because, where the tenant has shewn himself ready on the day *by the tender*, he has done all that in reason can be required of him; for it would put the tenant to endless trouble to oblige him every day to make a tender; it being altogether uncertain when the lessor will come for his Rent, when he has omitted to receive it the day he appointed by the lease for payment and receipt; wherefore as the lessee must expect the lessor, and be ready to pay it at the day appointed, or else the lessor may distrain for it without any demand; so where the lessor has lapsed the day of payment, and was not on the land to receive it, he must give the tenant notice to pay it before he can distrain; for the tenant shall be put to no trouble where it appears that he has omitted nothing on his part. *Hob.* 207: 2 *Roll. Abr.* 427.

And where the tender was made by a tenant on the land at the day, there a demand on the land is sufficient to justify a distress after the day; because the demand in such case is of equal notoriety with the tender, and by parity of reason the tenant ought to take notice of such demand, as well as the lessor of the tender on the land. *Hob.* 207.

But if the tenant had tendered the Rent on the day to the person of the lessor, and he refused it, it seems, by the better opinion, that the lessor cannot distrain for that Rent, without a demand of the person of the tenant; because the demand ought to be equally notorious to the tenant, as the tender was to the lessor. *Hob. 207: 2 Roll. Abr. 427.*

So, if the services by which the tenant holds be personal, as homage, fealty, &c. the demand must be of the *person* of the tenant; because this service is only performable by the very person of the tenant; therefore a demand, where he is not, would be improper. *Hut. 13: Hob. 207.*

Again, if the Rent be Rent-seck, and the tenant be ready at the *last* instant of the day of payment to pay the Rent, and the grantor is not *there* to receive it, he must afterwards demand it of the person of the tenant on the lands, before he can have his assise; because the tenant, by the tender at the day, has done all that was required on his part; and if the grantee might have his assise, after such tender on the day, without a demand of the person, the tenant might be made a disseisor, and damages for the disseisin laid on him without any wilful default in him; but in the case of a Rent-charge, after such tender of the tenant on the land, the grantee may afterwards demand the Rent on the land, because he has his remedy by distress, which is no more than a pledge for the Rent; and this being to be found and taken on the land, the grantee need only demand his Rent where he can find his remedy, which is on the land; but in this case if the grantee cannot find the tenant on the land to demand the Rent, he may, on the next feast on which the Rent is payable, demand all the arrears on the land; and if the tenant is not there to pay it, he has failed of his duty, and is guilty of a wilful default which amounts to a denial; and that denial being a disseisin of the Rent, the grantee may have his assise, and by that shall recover the arrears. *Cro. Car. 508: 7 Co. 57: Hob. 207: 2 Roll. Abr. 427.*

But if there has been neither a tender of the Rent, nor a demand of the grantee on the day, there the grantee may afterwards demand the Rent on the land; because the tenant having omitted to do his duty by a tender on the day, he is still obliged to answer the legal demands of the grantee, which is well made on the land, because *the Rent issues thereout*; for where there is no tender on the day of payment, the Rent is due and payable every day afterwards; therefore a demand in the same manner as the Law requires is sufficient; consequently the non-payment, after a demand on the land, is a denial and disseisin, for which the grantee may have his assise. *Litt. § 233: 7 Co. 57: 2 Roll. Abr. 427.*

If a lease be made, reserving Rent, and a bond given for performance of covenants and payment of the Rent, the lessor may sue the bond without demanding the Rent. *Cro. Eliz. 332: Cro. Car. 76: Hob. 8.*

If there be several things demised in one lease, with several reservations, with a clause, that, if the several yearly Rents reserved be behind or unpaid in part, or in all, by the space of one month, after any of the days on which the same ought to be paid, that then it shall be lawful for the lessor, into such of the premises, whereupon such Rents, being behind, is or are reserved, to re-enter; these are in the nature of distinct demises, and several reservations; consequently

there must be distinct demands on each demise to defeat the whole estate demised. *Vaugh.* 71, 72. But see *stat. 4 Geo. 2. c. 28. § 2.*

Also as to the necessity of a demand of the Rent, there is a difference between a condition and a limitation; for instance, if tenant for life (as the case was by marriage settlement with power to make leases for twenty-one years, so long as the lessee, his executors or assigns, shall duly pay the Rent reserved) makes a lease pursuant to the power; the tenant is at his peril obliged to pay the Rent without any demand of the lessor; because the estate is limited to continue only *so long* as the Rent is paid; therefore, for non-performance, according to the limitation, the estate must determine; as if an estate be made to a woman *dum sola fuerit*, this is a word of limitation which determines her estate on marriage. *Vaugh.* 31, 32: *Vide Hob.* 331: 2 *Roll. Abr.* 429: 2 *Mod.* 264: 3 *Co.* 64: *Dyer* 87, 88: *Noy* 145.

IV. RENT is regularly due and payable upon the land from whence it issues, if no particular place is mentioned in the reservation: *Co. Litt.* 201: But, in case of the king, the payment must be either to his officers at the Exchequer, or to his receiver in the country. 4 *Repl.* 73. And, strictly, the Rent is demandable and payable before the time of sun-set of the day whereon it is reserved; though, perhaps not absolutely due till midnight. *Co. Litt.* 302: 1 *Anders.* 253: 1 *Saund.* 287: *Prec. Chanc.* 555: *Salk.* 578.

If the lessor dies before sun-set on the day upon which the Rent is demandable, it is clearly settled, that the Rent unpaid is due to his heir, and not to his executor: But if he dies after sun-set, and before midnight, it seems to be the better opinion, that it shall go to the executor, and not to the kin. 1 *P. Wms.* 178.

There is a material difference between the reservation of a Rent payable on a particular day, or within a certain time after; and the reservation of a Rent payable at a certain day, with a condition that, if it be behind, by the space of any given time, the lessor shall enter; in both cases, a tender on the first or last day of payment, or on any of the intermediate days, to the lessor himself, either upon or out of the land, is good: But, in the former case, it is sufficient, if the lessee attends on the first day of payment at the proper place; and if the lessor does not attend there to receive the Rent, the condition is saved. In the latter case, to save the lease it is not sufficient that the lessee attends on the first day of payment, for he must equally attend on the last day. 10 *Repl.* 129, a: *Plowd.* 70, a, b: *Cro. Eliz.* 48. See 1 *Inst.* 202, a. in n.

The other effects of this question of the time of the Rent becoming due, are now in equal measure superseded by the statute regulations already stated and alluded to. But the following determinations on the subject may, notwithstanding, be requisite to be known.

The time for payment of Rent, and consequently for a demand is such a convenient time before the sun-setting of the last day, as will be sufficient to have the money counted; but if the tenant meet the lessor on the land at any time of the last day of payment, and tenders the Rent, that is sufficient tender, because the money is to be paid indefinitely on that day, therefore a tender on the day is sufficient. *Co. Litt.* 202, a: *Dalst.* 44: *Sav.* 253: 4 *Leon.* 171: 1 *Saund.* 287.

If a lease is made, rendering Rent at *Michaelmas*, between the hours of one and five in the afternoon, with a clause of re-entry, and the

lessor comes at the day, about two in the afternoon, and continues to five, this is sufficient. *Cro. Eliz.* 15. The demand may be by Attorney. 4 *Leon.* 479. But the power must be special, for such land and of such tenant. *Yelv.* 37: 1 *Brownl.* 138. Demand must be proved by witnesses. *Dyer* 68. Must be made of the precise sum due. 1 *Leon.* 305: *Sav.* 121: *Mo.* 207.

If a lease be made, reserving Rent on condition that if the Rent be behind at the day, and ten days after, (being in the mean time demanded,) and no distress to be found upon the land, that the lessor may re-enter; if the Rent be behind at the day, and ten days after, and a sufficient distress be on the land till the afternoon of the tenth day, and then the lessee takes away his cattle, and the lessor demands the Rent at the last hour of the day, and the lessee does not pay it, and there is not any distress on the land; yet the lessor cannot enter, because he made no demand in the mean time between the day of payment and the ten days, which by the clause he was obliged to do. *Cro. Eliz.* 63.—But see *stat.* 4 *Geo.* 2. c. 28: *ante* II.

As to the place of demanding Rent, there is a difference between a remedy by re-entry and distress; for when the Rent is reserved, on condition that, if it be behind, that the lessor may re-enter, in such case the demand must be upon *the most notorious place* on the land; therefore, if there be a house on the land, the demand must be at the *fore-door* thereof, because the tenant is presumed to be *there* residing, and the demand being required to give notice to the tenant that he may not be turned out of possession, without a wilful default, such demand ought to be in the place where the end and intention will be best answered. *Co. Litt.* 153. 201: 2 *Roll. Abr.* 428.

And it seems the better opinion, that it is not necessary to enter the house, though the doors be open, because that is a place appropriated for the peculiar use of the inhabitant, into which no person is permitted to enter without his permission; and it is reasonable that the lessor shall go no further to demand his rent, than the tenant should be obliged to go, when he is bound to tender it; and a tender by the tenant *at the door* of the house of the lessor is sufficient, though it be open, without entering; therefore by parity of reason, a demand by the lessor at the door of the tenant, without entering, is sufficient. *Dalst.* 59: *Co. Litt.* 201: 1 *And.* 27: 3 *Leon.* 4: and see *Cro. Eliz.* 13.

But when the demand is only in order for a distress, there it is sufficient, if it be made on any notorious part of the land, because this is only to entitle him to his *remedy* for his Rent; therefore, the whole land being equally debtor, and chargeable with the Rent, a demand on it, without going to any particular part of it, is sufficient. *Co. Litt.* 153.

See other cases, on this subject, *Co. Litt.* 202: *Bendl.* 59: *Cro. Eliz.* 324: *Cro. Car.* 507. 521: *Co. Litt.* 153. 201: 4 *Co.* 73: *Cro. Eliz.* 462: *Mo.* 404: *Dyer* 37: 2 *Roll. Abr.* 428: *Dyer* 229.

For more learning on this subject, see 4 *New Abr.*: and 18 *Vin. Abr.* title *Rent*.

RENTAL, (corrupted from *Rent-roll*.) A roll wherein the Rents of a manor are written and set down, by which the lord's bailiff collects the same. It contains the lands and tenements let to each tenant, and the names of the tenants, the several Rents arising, and for what time, usually a year. *Compl. Court Keep.* 475.

RENTAL-RIGHT. A species of lease given usually at a low Rent and for life; where they were given to a tenant and his heirs they were a good ground of possession to the first heir after the decease of the original tenant. Such Tenants were called *Rentalers*, or *kindly-tenants*. See *Bell's Scotch Dict.*

RENTAL'D Teind Bolls, is when the teinds (tithes) have been liquidated, and settled for so many bolls of Corn yearly, by Rental, or an old use of payment. *Scotch Dict.*

RENTS OF ASSISE. The certain Rents of freeholders and antient copyholders; so called, because they were *assised*, and different from others which were uncertain, paid in corn, &c. 2 *Inst.* 19. See title *Rent I.*

RENTS RESOLUTE, *Redditus resoluti.*] Are accounted among the Fee-Farm Rents to be sold by *stat. 22 Car. 2. c. 6.* being such Rents or tenths as were antiently payable to the Crown, from the lands of abbeys and religious houses; and after their dissolution, notwithstanding the lands were demised to others, yet the Rents were still reserved, and *made payable again* to the Crown. *Cowell.*

RENUNCIATION; the act of renouncing a right: as executors may renounce or refuse to take probate of a will. See title *Executors.*

REPARATIONS. A tenant for life or years may cut down timber-trees to make Reparations, although he be not compelled thereto; and where a house is ruinous at the time of the lease made, and the lessee suffers it to fall, he is not bound to rebuild it; and yet if he fell timber for Reparations, he may justify the same. *Co. Litt.* 54.

Lessee covenants, that from and after the amendment and Reparation of the houses by the lessor, he at his own charges will keep and leave them in repair: In this case the lessee is not obliged to do it, unless the lessor first make good the Reparations: And if it be well repaired at first, when the lease began, and after happen to decay; the lessor must first repair, before the lessee is bound to keep it so. *Cro. Jac.* 645: see also 2 *Leon. c. 72*: and this Dict. titles *Lease*; *Covenant*; *Waste.*

REPARATIONE FACIENDA, An antient writ which lies in many cases; one whereof is where there are tenants in common or joint-tenants of a house, &c. which is fallen into decay, and one is willing to *repair* it, but the others are not: In this case, the party willing to *repair* the same shall have this writ against the others. *F. N. B.* 127.

And if a man have a house adjoining to my house, and he suffer his house to lie in decay, to the annoyance of my house, I may have a writ against him to *repair* his house. So, if a person have a passage over a bridge, and another ought to *repair* the bridge, who suffers it to fall to decay, &c. *New Nat. Br.* 281.

REPETUNDARUM CRIMEN. The crime of receiving a bribe to prevent justice: See titles *Bribery*; *Barratry*; *Extortion*, &c.

REPEAL, from the Fr. *rappele*, i. e. *revocatio*.] A Revocation; as the *repealing* of a statute is the revoking or disannulling it. *Rastal.*

It is said, a pardon of felony, &c. may be repealed on disapproving the suggestion, 1 *Keb.* 19. See title *Pardon.*

A deed or will may stand good as to part, and be repealed for the rest. *Style* 241. A defendant, in a suit cannot repeal or revoke his Warrant of Attorney given to an attorney to appear for him, &c. 2 *Lit. Abr.* 452; without first paying his bill. See title *Attorney.*

REPLEADER, *Replacitare*.] To plead again. See title *Pleading* 1. 3. *ad finem*.

Repleader is to be had where the pleading hath not brought the issue in question, which was to be tried: Also, if a verdict be given where there was no issue joined, there must be a Repleader to bring the matter to trial, &c. 2 *Lil. Abr.* 460.

It was held, that, at Common Law, a Repleader was granted before trial, because a verdict did not cure an immaterial issue; but that now a Repleader ought never to be awarded before trial, because the fault in the issue may be helped by the statutes of *Jecfails*: That if a Repleader is denied where it should be granted, or *è converso*, it is error; and the judgment in Repleader is general (*viz.*) *Quod partes replacent*: They must begin again at the first fault, which occasioned the immaterial issue; if the declaration and the bar, and the replication be all ill, they must begin *de novo*; but if the bar be good, and the replication ill, they must begin at the replication; and no costs are allowed on either side; and a Repleader cannot be awarded after a default. 2 *Salk.* 579.

Though a Repleader is allowed after verdict; it has been adjudged, not to be awarded after demurrer: (But a Repleader hath formerly been granted after demurrer, and likewise after the demurrer argued;) and that a Repleader can never be awarded after a writ of error; but only after issue joined, &c. *Latch.* 147: 3 *Lev.* 440: *Mod. Ca.* 102. See the *Form* of a *Repleader*, *Lutw.* 1622.

REPLEGIARE, To redeem a thing detained or taken by another, by putting in legal sureties. See *Replevin*.

Repledging is applied in the *Scotch* Law to the power of reclaiming a criminal and trying him under a different jurisdiction from that of the Court before which he is accused.

REPLEGIARE DE AVERIIS, a Writ brought by one whose cattle are distrained, or put in the pound, on any cause, by another person, on surety given to the Sheriff to prosecute or answer the action at Law. *P. N. B.* 68: *Reg. Orig.*: *Stat. 7 H. 8. c. 4.* See *Replevin*.

REPLEVIN,

PLEVINA; from *replegiare*, to re-deliver to the owner on Pledges; 1 *Inst.* 145, *b.*: or, to take back the Pledge; 3 *Comm.* 13: It is sometimes incorrectly used for the bailing a man.

- I. *The Definition of the Term; and the general Principles of the Law of Replevin.*
- II. *More particularly; for what Things a Replevin lies; and for whom.*
- III. *Of the different Kinds of Replevin; out of what Courts they issue; and of the Power and Duty of the Sheriff.*
- IV. 1. *Of the Pledges, and the Proceedings against them.* 2. *Of the Pleadings and Damages.*
- V. *Of the Original Writ, and the Writ of Withernam.*
- VI. 1. *Of the Writ of second Deliverance; and, 2. the Writ De Proprietate probandâ.*
- VII. *Of the Writ De Retorno habendo; of Return irreflevisable; and in what Manner the Sheriff is to return and execute such Processes.*

I. A REPLEVIN is a remedy grounded and granted on a Distress; being a re-deliverance of the thing distrained, to remain with the first possessor, on security (or pledges) given by him to try the right with the distrainer, and to answer him in a course of Law.—Or, it is bringing the Writ called *Replegiari facias*, by him who has his cattle or goods distrained by another, and putting in surety to the Sheriff, that on delivery of the thing distrained, he will prosecute the action against the distrainer. *Lit. lib. 2. c. 12. § 219: 1 Inst. 145, b.*

Replevin is a writ, and usually granted in cases of distress, and is a matter of right; so that if a man grants a rent with clause of distress, and grants further, that the distress taken shall be irreplevisable, yet it may be replevied; for such restraint is against the nature of a distress, and no private person can alter the common course of the Law. *Co. Lit. 145.*

An action of Replevin is founded upon, and is the regular way of contesting the validity of, a distress: being a re-delivery of the pledge, or thing taken in distress, to the owner, by the Sheriff, or his deputy: upon the owner's giving security to try the right of the distress, and to restore it, if the right be adjudged against him: after which, the distrainer may keep it, till tender made of sufficient amends, but must then re-deliver it to the owner. *3 Comm. c. 9. p. 147, cites 1 Inst. 145: 8 Rep. 147.*

In this writ, or action, both plaintiff and defendant are called *Actors*; the one, *i. e.* the plaintiff, suing for damages; and the other, the avowant, or defendant, to have a return of the goods or cattle. *2 Benth. 84: Cro. Eliz. 799: 2 Mod. 149.* Therefore, either party may carry down the cause; and if the defendant give notice, and do not go on to trial, the Court will give costs against him: for the same reason, the defendant may not move for judgment of nonsuit, unless the plaintiff has given notice of trial. *Bull. N. P. 61.*

That the avowant (the person making the distress) is in nature of a plaintiff, appears, 1st, from his being called an Actor, which is a term in the Civil Law, and signifies plaintiff; 2dly, from his being entitled to have judgment *de retorno habendo*, and damages, as plaintiff; 3dly, from this, that the plaintiff may plead in abatement of the avowry, consequently such avowry must be in nature of an action. *Carth. 122: 6 Mod. 103: Yelv. 148.*

The avowant, being in nature of a plaintiff, need not aver his avowry with an *hoc paratus est verificare*, more than any other plaintiff need aver his count. *Plowd. 263. See post. IV.*

Nor shall he have a protection cast for him more than any other plaintiff. *2 Inst. 339.*

But though an avowry be in nature of an action, yet one tenant in common may avow for taking cattle damage-feasant. *Cro. Eliz. 530.*

Replevin is an action founded on the right, and different from trespass. *Carth. 74: Yelv. 148: Hob. 16: Cro. Eliz. 799.*

It is now held, that, as no lands can be recovered in this action, it cannot, with any propriety, be considered as a real action; though the title of lands may incidentally come in question, as it may do in an action of trespass or even of debt, which are actions merely personal. *Finch's Law 316: and see Comb. 476: Fitzg. 109.*

Formerly, when the party distrained upon intended to dispute the right of the distress, he had no other process by the old Common Law, than by a writ of Replevin, *replegiari facias*; which issued out

of chancery, commanding the sheriff to deliver the distress to the owner, and afterwards to do justice, in respect to the matter in dispute, in his own County-court. *P. N. B.* 68. But, this being a tedious method of proceeding, the beasts, or other goods, were long detained from the owner, to his great loss and damage. 2 *Inst.* 139. For which reason, the statute of *Marlbridge*, (52 *Hen.* 3.) c. 21. directs, (that without suing a writ out of the chancery) the sheriff immediately, upon plaint to him made, shall proceed to replevy the goods. See *post.* III. And for the greater ease of the parties, it is farther provided by *stat.* 1 & 2 *P. & M.* c. 12. that the sheriff shall make at least four deputies in each county for the sole purpose of making Replevin. See *post.* III. Upon application, therefore, either to the sheriff, or one of his said deputies, security is to be given, in pursuance of the statute of *West.* 2. 13 *Edw.* 1. c. 2; 1st, That the party replevying will pursue his action against the distrainer; for which purpose he puts in *plegios de proseguendo*, or pledges to prosecute: 2dly, That if the right be determined against him, he will return the distress again; for which purpose he is also bound to find *plegios de retorno habendo*. See *post.* IV. Besides these pledges, the sufficiency of which is discretionary, and at the peril of the sheriff, the *stat.* 11 *Geo.* 2. c. 19. § 23. requires, that the officer granting a Replevin on a distress for rent, shall take a bond with two sureties in a sum of double the value of the goods distrained, conditioned to prosecute the suit with effect and without delay, and for return of the goods; which bond shall be assigned to the avowant, or person making cognizance on request made to the officer; and, if forfeited, may be sued in the name of the assignee. See *post.* IV. And certainly as the end of all distresses is only to compel the party distrained upon, to satisfy the debt or duty owing from him, this end is as well answered by such sufficient sureties, as by retaining the very distress, which might frequently occasion great inconvenience to the owner; and that the Law never wantonly inflicts. The sheriff, on receiving such security, is immediately, by his officers, to cause the chattels taken in distress, to be restored into the possession of the party distrained upon; unless the distrainer claims a property in the goods so taken. For if, by this method of distress, the distrainer happens to come again into possession of his own property in goods, which before he had lost, the Law allows him to keep them, without any reference to the manner by which he thus has regained possession; being a kind of personal *Remitter*. See title *Remitter*. If, therefore, the distrainer claims any such property, the party replevying must sue out a writ *de proprietate probanda*, in which the sheriff is to *prove* by an inquest, in whom the *property*, previous to the distress, subsisted. *Finch. L.* 316. And if it be found to be in the distrainer, the sheriff can proceed no farther; but must return the claim of property to the court of King's Bench or Common Pleas, to be there farther prosecuted, if thought advisable, and there finally determined. *Co. Litt.* 145: *Finch. L.* 450.

But if no claim of property be put in, or if (upon trial) the sheriff's inquest determines it against the distrainer; then the sheriff is to replevy the goods; (making use of even force, if the distrainer makes resistance; 2 *Inst.* 193;) in case the goods be found within his county. But if the distress be carried out of the county or concealed, then the sheriff may return, that the goods, or beasts are *eloigned*; *elon-*

gata, carried to a distance, to places to him unknown: and thereupon the party replevying shall have a writ of *capias in withernam; in veltito* (or more properly, *repetito*) *namio*; a term which signifies a second or reciprocal distress, in lieu of the first which was eloigned. It is therefore a command to the sheriff to take other goods of the distrainor, in lieu of the distress formerly taken, and eloigned, or withheld from the owner. *F. N. B.* 69. 73. So that here is now distress against distress; one being taken to answer the other, by way of reprisal, and as a punishment for the illegal behaviour of the original distrainor. For which reason, goods taken in *withernam*, cannot be replevied, till the original distress is forth-coming. 3 *Conim. c.* 9. See *post.* III.

But, in common cases, the goods are delivered back to the party replevying, who is then bound to bring his action of Replevin; which may be prosecuted in the County-court, be the distress of what value it may. 2 *Inst.* 139. But either party may remove it to the superior courts of King's Bench or Common Pleas, by writ of *recordari*, or *pone*; 2 *Inst.* 23; the plaintiff at pleasure, the defendant upon reasonable cause; *F. N. B.* 69, 70: And also, if in the course of proceeding any right of freehold comes in question, the sheriff can proceed no farther; so that it is usual to carry it up, in the first instance, to the courts of *Westminster-Hall*. *Finch. L.* 317. Upon this action brought, and a declaration delivered, the distrainor, who is now the defendant, makes *Avowry*; that is, he *avows* taking the distress in his own right, or the right of his wife; and sets forth the reason of it, as for rent arrere, damage done, or other cause: or else, if he justifies in another's right, as his bailiff or servant, he is said to make *Cognizance*: that is, he acknowledges the taking, but insists that such taking was legal, as he acted by the command of one who had a right to distrain: and on the truth and legal merits of this avowry or cognizance the cause is determined. If it be determined for the plaintiff, *viz.* that the distress was wrongfully taken, he has already got his goods back into his own possession, and shall keep them, and moreover recover damages. *F. N. B.* 69. See *stat.* 21 *H.* 8. *c.* 19: and *post.* IV. But if the defendant prevails, by the default or nonsuit of the plaintiff, then he shall have a writ *de retorno habendo*, whereby the goods or chattels (which were distrained and then replevied) are returned again into his custody; to be sold, or otherwise disposed of, as if no replevin had been made. And at the Common Law, the plaintiff might have brought another Replevin, and so *in infinitum*, to the intolerable vexation of the defendant. Wherefore the statute of *Westm.* 2. *c.* 2. restrains the plaintiff, when nonsuited, from suing out any fresh Replevin; but allows him a judicial writ, issuing out of the original record, and called a writ of *Second Deliverance*, in order to have the same distress again delivered to him, on giving the like security as before. And, if the plaintiff be a second time nonsuit, or if the defendant has judgment upon verdict or demurrer in the first Replevin, he shall have a writ of Return irreplevisable: after which no writ of Second Deliverance shall be allowed. 2 *Inst.* 340. But in case of a distress for rent arrere, the writ of Second Deliverance is in effect taken away by *stat.* 17 *Car.* 2. *c.* 7; which directs that, if the plaintiff be nonsuit before issue joined, then, upon suggestion made on the record in nature of an avowry or cognizance; or if judgment be given against him on demurrer, then, without any such sugges-

tion; the defendant may have a writ to inquire into the value of the distress by a Jury, and shall recover the amount of it in damages, if less than the arrear of rent; or, if more, then so much as shall be equal to such arrear, with costs: or, if the nonsuit be after issue joined, or if a verdict be against the plaintiff, then the jury impaneled to try the cause shall inquire concerning the sum of the arrears, and the value of the goods, &c. distrained: and thereupon the defendant shall have judgment for such, or so much thereof, as the goods, &c. distrained amounted unto: And if (in any of these cases) the distress be insufficient to answer the arrears distrained for, the defendant may take a farther distress, or distresses. See 1 *Vent.* 64. But otherwise, if, pending a Replevin for a former distress, a man distrains again for the same rent or service, then the party is not driven to his action of Replevin, but shall have a writ of recaption, and recover damages for the defendant, the re-distrainer's, contempt of the process of the Law. *F. N. B.* 71. 3 *Comm. c.* 9. See title *Recaption*.

II. It is a general rule, that the plaintiff ought to have the property of the goods in him at the time of the taking: and not only a general property, which every owner hath, but also a special property, such as a person hath who hath goods pledged with him, or who hath the cattle of another to manure his lands, &c. is sufficient to maintain a Replevin, and in such cases either party may bring a Replevin. *Co. Litt.* 145: *Winch.* 26.

A Replevin doth not lie of things which are *fera natura*, as conies, hares, monkies, dogs, &c. but if things, wild by nature, are made tame, or are reclaimed, so long as they continue in that condition, they belong to the person who hath the possession of them, and he may bring Replevin; and the general rule herein seems to be, that a Replevin lies for any thing that may by Law be distrained. 2 *Roll. Abr.* 430: *Godb.* 124. See title *Distress*.

We read of *canes replegiati*, hounds replevied, in a case between the abbot of *St. Alban's* and *Geoffrey Childwick*, 24 *Hen.* 3.

Goods may be replevied by writ, which is by the Common Law, or by plaint, which is by Statute Law, for the more speedy having again their cattle and goods.

A Replevin lies of a leveret; for it has *animum revertendi*; for the same reason it lies of a *ferret*; but it is said not to lie for a mastiff dog, though an action of trespass will. *Br. Repl.* 64: 2 *Roll. Abr.* 430. *Sed quære?*

Replevin lies of a swarm of bees. *F. N. B.* 68.

But not of trees, or timber growing; nor of things annexed to the freehold, because such things cannot be distrained; yet Replevin lies of certain iron belonging to the party's mill. *F. N. B.* 68.

So Replevin doth not lie of deeds or charters concerning lands; for they are of no value, but as they relate thereto. *Bro. Repl.* 34.

Nor of money, or leather made into shoes. *Moor* 394: 2 *Brownl.* 139.

If a mare in foal, a cow in calf, &c. are distrained, and they happen to bring forth their young, whilst they are in the custody of the distrainer, a Replevin lies for the foal, calf, &c. *Bro. Repl.* 41: *F. N. B.* 69: 1 *Sid.* 82.

Replevin lies for a ship; so for the sails of the ship. *March.* 110:

Raym. 232. Replevin lies not for goods taken beyond sea, though brought hither by the defendant afterwards. *i Show.* 91.

He that brings Replevin must have an absolute, or at least a special, property in the thing distrained; and therefore several men cannot join in a Replevin, unless they be joint-tenants, or tenants in common. Executors may have a Replevin of a taking in *vita testatoris*. So, if the cattle of a *feme sole* be taken, and she afterwards intermarry, the husband alone may have Replevin; but, if they join after verdict, judgment will not be arrested, because the Court will presume them jointly interested; (as they may be, if a distress be taken of goods of which a man and woman were joint-tenants, and afterwards intermarry;) the avowry admitting the property to be in the manner it is laid. *Bull. N. P. c. 4. p. 53.*

If I distrain another's cattle damage-feasant, and, before they are impounded, he tenders me sufficient amends; now, though the original taking was lawful, my subsequent detainment of them, after tender of amends, is wrongful, and he shall have an action of Replevin against me to recover them; in which he shall recover damages only for the detention, and not for the caption, because the original taking was lawful. *F. N. B.* 69. See 3 *Comm. c. 9.* But if the tender were before the taking, the taking is tortious: if after impounding, neither the taking nor detaining is tortious. And after the avowant has had return irreplevisable, yet if the plaintiff make sufficient tender, he may have his action of *detinue* for the detainer after. *Bull. N. P.* 60.

III. REPLEVIN may be made either by original writ of Replevin, at Common Law, or by plaint, under the *stat. of Marl. 52 H. 3. c. 21: Co. Litt. 145: F. N. B.* 69.

The following are the words of this statute: "That if the beasts of any person be taken, and wrongfully withholden, the sheriff after complaint made to him thereof, may deliver them, without let or gainsaying of him that took the beasts, if they were taken out of liberties; and if the beasts were taken within any liberties, and the bailiff of the liberty will not deliver them, then the sheriff, for default of those bailiffs, should cause them to be delivered."

The mischiefs before this act, as has been already hinted, were the great delay and loss the party was at, by having his beasts or goods withholden from him; as also, that when cattle were distrained and impounded within any liberty which had return of writs, the sheriff was obliged to make a warrant to the bailiff of the liberty to make deliverance; and there was another mischief, when the distress was taken without and impounded within the liberty. To remedy which, by this statute, the sheriff, *on plaint made to him without writ*, may, either by parol or precept, command his bailiff to deliver the beasts or goods, that is, to make *Replevin* of them; and by these words, (*post querimoniam sibi fact'*) the sheriff may take a plaint out of the County-court, and make a *Replevin* presently, which he is to enter in the Court; as it would be inconvenient, and against the scope of the statute, that the owner, for whose benefit the statute was made, should tarry for his beasts till the next County-court, which is holden from month to month. And, by this act, the sheriff may hold plea in the County-court on *Replevin* by plaint, though the value be of 40*s.* or above; and yet, in other actions, he shall only hold plea where the

matter is under 40s. value. 2 *Inst.* 139: 13 *Co.* 21: 1 *Keb.* 205: *Dalt.* Sh. 430.

Replevins by writ issue, properly, out of chancery, returnable into the Courts of *K. B.* and *C. B.* at *Westminster*. *F. N. B.* 68: *Gilb. Distr. & Repl.* 68. and *post.* V.

Replevins by plaint are made by the sheriff by force of the above-mentioned statute of *Marlbridge*; by which he is directed on complaint made to him by the party, that his goods or cattle are distrained, to command his bailiff, (which may be by parol or precept) to make deliverance; and which plaint may be taken at any time, and as well out of, as in Court. *Bro. Repl. pl.* 4: *Co. Litt.* 145: 2 *Inst.* 139.

It becomes the sheriff's duty, on complaint, by parol or by precept to his bailiff, to replevy the cattle, which *precept may be given before any County-court*; but such plaint is afterwards to be entered by the party who made the complaint, and not by the sheriff. 2 *Com. Repl.* 591.

The action of *Replevin* is of two sorts: 1. In the *detinet*; 2. In the *detinuit*. Where the party has had his goods redelivered to him by the sheriff, upon a writ of *Replevin*, or upon a plaint levied before him, the action is in the *detinuit*; but where the sheriff has not made such *Replevin*, but the defendant still has the goods, the action is in the *detinet*: However, of late years, no action has been brought in the *detinet*, though there is much curious learning in the old books concerning it. The advantage the plaintiff has in bringing an action of *Replevin* in the *detinet*, in preference to an action of trespass *de bonis asportatis*, is, that he can oblige the defendant to re-deliver the goods immediately, in case, upon making his avowry, they appear to be replevisable: but as, in such cases, he may more speedily have them delivered to him by application to the sheriff in the common way, it is of no use; unless the distrainer have eloiigned the goods, so that the sheriff cannot get at them to make *Replevin*; and in such case the plaintiff may bring an action of *Replevin* in the *detinet*, and after avowry, pray that the defendant may gage deliverance; or he may, upon return of an *elongavit* to the *pluries* writ of *Replevin*, have a writ to the sheriff, commanding him to take other beasts, &c. of the defendant in *withernam*: But if the defendant, before the return of the *withernam*, appear to the writ of *Replevin*, and offer to plead *non cepit*, it shall stay the *withernam*; for the defendant shall not be concluded by the return of an *elongavit*, since the sheriff can make no other return where he cannot find the thing to be replevied. *Bull. N. P. c.* 4.

The hundred court, and courts of lords of manors, may by prescription hold plea in *Replevin*, so may incidentally have power to replevy goods or cattle; but that, it seems, must be by process of the court after a plaint entered, but not by parol complaint out of court. *Carth.* 380.

Therefore, where in trespass for taking goods, &c. the defendant justified that the place where, &c. was a hundred, and time out of mind had a court of all actions, *Replevins*, &c. grantable in or out of court, *virtute cujus*, &c. The question was, *If good or not?* And the reason of the doubt was, because the County-court could not hold plea in *Replevin* at Common Law; but were enabled by the statute of *Marlbridge*, which extends not to the hundred court, which is a court derived out of the County-court; but per Cur. clearly, Suppo-

sing they may grant them in court, yet they cannot prescribe to grant them *out of court*. 2 *Salk.* 580: 5 *Mod.* 252: *Skin.* 674: *Carth.* 380: 1 *Ld. Raym.* 219.

The sheriff is *obliged* to grant *Replevins* in all such cases as they are allowed by Law; and the officer who takes the goods, by virtue of a *Replevin* issuing for what cause soever, is *not liable to an action of trespass*, unless the party, in whose possession the goods were, *claims property* in them: And note; that in all cases of misbehaviour by the sheriff, or other officers, in relation to *Replevins*, they are subject to the control of the King's superior courts, and punishable by attachment for such misbehaviour. *Carth.* 381.

And though the sheriff may grant *Replevins by plaint*, and may proceed thereon in his County-court, yet if any thing touching freehold come in question, or antient *demesne* be pleaded, the sheriff can proceed no further; nor can any such proceedings be carried on in the hundred court, court baron, or any other court claiming a jurisdiction herein by prescription. 2 *H.* 7. 6: 4 *H.* 6. 30: *Co. Litt.* 145. b.

So, when the King is party, or the taking is in right of the Crown, in these cases the sheriff is to surcease. *Bro. Repl. pl.* 3: 1 *Brownl.* 3.

Where an act of Parliament orders a distress *and sale* of goods, *THIS is in nature of an Execution*, and *Replevin* does not lie; but if the sheriff grants one, yet it is not such a contempt as to grant an attachment against him; and *Powell*, Justice, said, He remembered a case in the Exchequer, where a distress was taken for a fee-farm rent due to the King and a *Replevin* granted, yet, on debate, no attachment was granted, though it was in the King's case. *Trin.* 12 *W.* 3. in *C. B. Bradshaw's* case. But it is now determined that, if goods be taken in execution, (or on a conviction before Justices,) the sheriff shall not make *Replevin* of them; and if in such case the sheriff should make *Replevin*, he would subject himself to an attachment; for goods are only replevisable where they have been taken by way of distress. *Bull. N. P. c.* 4. *p.* 53.

Whether goods taken under a warrant of distress by commissioners of sewers may be replevied while in the hands of the officer; and whether they may be replevied by the sheriff or his deputy, is doubtful: But if they be actually replevied, and the proceedings in *Replevin* be removed into *K. B.* that Court will not quash the proceedings on a summary application, but will leave it to the defendant in *Replevin* to put his objection on record. 6 *Term Rep. K. B.* 522.

The following is the provision of *stat.* 1 & 2 *P. & M. c.* 12. already alluded to; "That the sheriff shall at his first county-day, or within two months after he receives the patent, depute and proclaim in the shire-town four deputies to make *Replevins*, not dwelling twelve miles distant from one another; on pain to forfeit, for every month he wants such deputy or deputies, *5l.* to be divided between the King and the prosecutor."

IV. 1. WHEN the sheriff makes *Replevin* he ought to take two kinds of pledges; *flegii de prosequendo*, by the Common Law, and *flegii de retorno habendo*, by the statute of *West.* 2. c. 2. by which it is provided, "That sheriffs or bailiffs, from thenceforth, shall not only receive of the plaintiff pledges for pursuing the suit, before they make deliverance of the distress, but also for return of the beasts, if return be awarded; and if any take pledges otherwise, he shall an-

swer for the price of the beasts, and the lord that distrains shall have his recovery by writ, that he shall restore to him so many beasts or cattle; and if the plaintiff be not able to restore, his superior shall restore."

By *stat. 11 Geo. 2. c. 19.* Officers, having authority to grant Replevins, shall, in every Replevin of a distress for rent, take in their own names, from the plaintiff and two sureties, a bond in double the value of the goods distrained; (such value to be ascertained by the oath of one or more witnesses not interested, which oath the person granting such Replevin is to administer;) conditioned for prosecuting the suit with effect, without delay, and for returning the goods, in case a return shall be awarded, before any deliverance be made of the distress; and such officer, taking such bond, shall, at the request and costs of the avowant, or person making consuance, assign such bond to the avowant, &c. by indorsing the same, and attesting it under his hand and seal, in the presence of two witnesses; which may be done without stamp, provided the assignment be stamped before any action brought thereon; and if the bond be forfeited, the avowant, &c. may bring an action thereupon in his own name, and the Court may by rule give such relief to the parties on such bond, as may be agreeable to justice; and such rule shall have the effect of a defeasance.

In the construction of these statutes the following points have been ruled, and opinions holden:

Under *stat. Westm. 2. c. 2.* an action lies against the sheriff, if he omit to take pledges, or if he take those that are insufficient; and the party may have a *scire facias* against the pledges, where the suit is in any Court of Record; and though in the County-court, &c. a *scire facias* will not lie against the pledges, because these are not Courts of Record, and every *scire facias* ought to be grounded on a Record, yet there the party may have a precept, in nature of a *scire facias*, against the pledges. 1 *Ld. Raym.* 278: See 1 *Comb.* 1, 2: *Com.* 593.

An action will lie against the sheriff not only for not taking a bond, but also for taking insufficient pledges. *Rous v. Patterson*, *Hil.* 13 *Geo. 2. B. R.* on a writ of error from *C. B.* 16 *Vin. Ab.* 399. *pl.* 4.; under the name of *Prowse v. Pattison*, *Bull. N. P.* 60. In such an action some evidence must be given by the plaintiff of the insufficiency of the pledges or sureties; but very slight evidence is sufficient to throw the proof upon the sheriff. *Saunders v. Darling*, *Westminster Sittings*, *Trin.* 10 *Geo. 3. C. B. Bull. N. P.* 60. Though there have been contradictory determinations respecting the extent of the sheriff's liability in such an action, the point seems now to be settled. In *Prowse v. Pattison*, the party recovered damages to the amount of the rent in arrear added to the costs of Replevin: but the whole together did not exceed the value of the distress. 4 *T. R. K. B.* 434. *n.* So in the case of *Gibson v. Burnell*, 30 *Geo. 3. Gould, J.* who tried the cause, was of opinion that the plaintiff was entitled to recover the costs in the Replevin as well as the rent in arrear, *ib.* But in *Yea v. Lethbridge*, *M.* 32 *Geo. 3.* the court of *K. B.* on a question reserved at the trial for their opinion, held that the plaintiff could not recover beyond the value of the distress taken, which was not equal to the rent in arrear, 4 *T. R. K. B.* 433. And though this decision was afterwards questioned in the Court of *C. P.* (the Court consisting of Lord Loughborough, *Ld. Ch. J. Gould, J. Heath, J. and Wilson, J.*) in

Concanen v. Lethbridge, E. 32 Geo. 3. 2 H. Bl. Rep. 36. where it was ruled after great consideration that the plaintiff might recover damages to the extent of the injury which he had sustained, though they exceeded double the value of the goods distrained: yet the authority of the case of *Yea v. Lethbridge* was again established in a subsequent case, *Evans v. Brander*, Tr. 35 Geo. 3. where the Court of Common Pleas (then consisting of *Eyre*, Ld. Ch. J.—*Buller*, J. *Heath*, J. *Rooke*, J. three of the Judges being then changed) decided that the sheriff was not liable for more than double the value of the goods distrained, 2 H. Bl. Rep. 547. The foundation of the last decision, and of that of *Yea v. Lethbridge* is this: that the sheriff is liable no further than the sureties would have been, if he had done his duty by taking a bond under the *stat.* 11 Geo. 2. c. 19. and the sureties had been sufficient; and that the extent of their responsibility is limited by the statute to double the value of the goods distrained.

The remedy in case of insufficient pledges is by action only; and the Court of C. P. refused to make an order on an officer to pay costs recovered by a defendant in Replevin. 1 New Rep. C. P. 292.

This action must be brought by the person making cognizance, where there is no avowant on the record, 1 Bos. and Pul. 378. A Replevin bond under 11 Geo. 2. c. 19. may be assigned to the avowant only, and he may bring his action without joining the party making cognizance, 1 Bos. & Pul. 381. n.

If the sheriff returns insufficient pledges, he shall answer according to the statute; for insufficient pledges are no pledges in Law; and such pledges must not only be sufficient in estate, *viz.* capable to answer in value, but likewise sufficient in law, and under no incapacity; therefore infants, feme covert, persons outlawed, &c. are not to be taken as pledges, nor are persons politic, or bodies corporate. Co. Litt. 145: 2 Inst. 340: 10 Co. 102.

In Replevin the sheriff did not return any pledges, and after issue joined and found, it was moved, if they could be put in by the court after verdict; and the court held they might, notwithstanding the statute of *Westm.* 2. as before that statute the Court might take pledges on the omission of the sheriff; and a diversity was taken between pledges for prosecuting, which were at Common law, and *firo retorno habendo* given by this statute; and the Court held, that though on default of the sheriff he was subject to the action of the party, that yet the taking of pledges by the Court did not make the judgment erroneous. *Noy* 156. And that the omission of pledges of the first description is error; but the omission of pledges *de retorno habendo* does not vitiate the proceedings, but subjects the sheriff to an action. See 1 Jon. 439: *Cro. Car.* 594. And if the sheriff omit to take bond, pursuant to the *stat.* 11 Geo. 2. c. 19. (see *ante* I. and *post.*) an attachment will not be granted, but the remedy is by action against him. 2 Term Rep. 617.

A Replevin by plaintiff was sued in the sheriff's court in London, and pledges were found *de retorno habendo*, *si*, &c. this plaintiff was removed according to their custom into the mayor's court, and after into the King's Bench by *certiorari*, and there oyer of *certiorari* being demanded, the party declared in B. R. On this a return was awarded, and on an *elongat'* returned, a *scire facias* went against the pledges in the sheriff's court of London. On demurrer, the question was, Whether, this case being removed by *certiorari*, the pledges in the

inferior court are discharged, or whether they remain liable to be charged by this *scire facias*? It was adjudged, that the pledges were not discharged. *Skin.* 244: 2 *Show.* 421. *Comb.* 1, 2. 3 *Mod.* 56. *S. C.*

The plaintiff declared, that he distrained for 7l. 10s. rent, reserved on a lease, and that the defendant delivered the cattle without taking pledges; to which the defendant pleaded, that the plaintiff in Replevin delivered to him 3l. 10s. for pledges, which he accepted; and on demurrer the Court held, that pledges being to be found to answer the party, if he had good cause of avowry, and to be answerable for amercement to the King, if nonsuited, or if it be found against him; the taking of money for a pledge was not lawful; and that although he might take money for pledges, yet he ought not to accept less than the plaintiff's demand: on which account the Court likewise held the plea vicious; but they agreed, that if the defendant had taken but one pledge, (if he had been sufficient,) it had been well enough. *Cro. Car.* 446: 1 *Jon.* 378.

A bond taken by the sheriff, conditioned that if the party applying for the Replevin should appear at the next County-court, &c. and prosecute his action with effect, and should make return of the thing replevied, if return should be adjudged, and save the sheriff harmless, &c. is good in law; and agreeable to the intent of the statute of *Marlbridge* which requires pledges or sureties, of which nature the obligors are; and this method of taking bond instead of pledges was said to be of antient usage; and that in the old books *pilegii* signified the same as sureties; and that there being a proper remedy on such bond, it differed from the case of taking a deposit or sum of money; but the Court agreed, that at Common Law this bond had been void, because it had been to save the sheriff harmless in making Replevin by plaint, which he could not have done before the statute of *Marlbridge*. 1 *Ld. Raym.* 278: 2 *Lutw.* 686.

If in Replevin in an inferior Court, the condition of the bond is, if he prosecute his suit commenced with effect in the court of, &c. and make return, &c. if a return be adjudged by Law, and it happens, that the plaintiff hath judgment in the court below, which is afterwards reversed on a writ of error in *B. R.* in such case, unless the party make a return, he forfeits his bond; for though he had judgment in the court below, yet the words, "if he prosecute his suit commenced," &c. extend to the prosecution of the writ of error, which is part of the suit commenced in the court below; and in this case, the taking such bond was held to be lawful, and said to be common practice. *Carth.* 248: 1 *Show.* 400: *Fitzg.* 158.

In debt on a Replevin-bond taken by the sheriff, conditioned that if *C. B.* appear at the next County-court and prosecute with effect for taking, &c. and make return, &c. if return be adjudged, and save harmless the sheriff, &c. then, &c. the defendant after oyer pleaded that at the next County-court, held on such a day, he did appear, and prosecuted, &c. until it was removed by *recordari*, and did save the sheriff harmless, but doth not say, that no *retorn habend'* was adjudged on demurrer, the Court inclined for the plaintiff; for the defendant should have said, that no return was adjudged at all; and though he prosecuted to the *recordari*, yet *retorn habend'* might be adjudged afterwards; and the condition goes to any adjudication of return. *Comb.* 228.

The condition of a Replevin bond is not satisfied by a prosecution

of the suit in the County-court, but that the plaint, if removed by the *recordari facias loquelam* into a superior court must be prosecuted there with effect, and a return made, if adjudged there. 1 *Bos. & Pul.* 410.

An action was brought on a bond in Replevin to prosecute his suit with effect, and also to make return, &c. the defendant pleaded that *E. G.* did levy a plaint in Replevin in the Court before the steward of *Westminster*, and that afterwards, and before the suit was determined, viz. such a day, &c. *E. G.* died; *per quod* the suit abated; the plaintiff replied, that true it is, that *E. G.* levied such a plaint against the defendant, who immediately afterwards exhibited an *English bill* in the Exchequer against the plaintiff in that suit, and by injunction hindered the proceedings below until such a day, &c. on which *E. G.* died; so that he did not prosecute his suit with effect: On demurrer to this replication the defendant had judgment; for, *per Holt*, this was a prosecution with effect, because there was neither a nonsuit or verdict against *E. G.* *Carth.* 519.

In an action on a Replevin-bond common bail shall be filed. 1 *Salk.* 99. See title *Bail*.

2. The declaration in Replevin ought to be certain in setting forth the numbers and kinds of cattle distrained: because, otherwise, the sheriff cannot tell how to make deliverance, if it should be necessary: yet an avowry may make that good, which would be bad on demurrer; both parties agreeing what the *quantum* and nature of the goods are. And the sheriff may require the defendant to shew him the goods; and it would be a good return to say, "that no one came, on the part of the defendant, to shew the goods and chattels." *Alcyn.* 32: *Stile* 71.

The declaration ought to be not only of a taking in a ville or town, but also "in a certain place called," &c.; but if the defendant would take advantage of this, he must demur to the declaration. *Hob.* 16.

A man may count of several takings, part at one day and place, and part at another; and if the plaintiff allege two places, and the defendant only answer one, *i. e.* if the plea begin only as an answer to part, and be in truth but an answer to part, it is a discontinuance; and the plaintiff must not demur, but must take his judgment for that by *nihil dicit*; for if he demur or plead over, the whole action is discontinued. But if a plea begin with an answer to the whole, but is in truth only an answer to part, the whole plea is nought, and the plaintiff may demur. *F. N. B.* 68: *Salk.* 176. Where the defendant avows at a different place, in order to have a return, he must traverse the place in the count, because his avowry is inconsistent with it; but where he does not insist upon a return, he may plead *non cepit*, and prove the taking to be at another place, for the place is material. *Stra.* 507. This is to be understood where the defendant never had the cattle in the place laid in the declaration at all; for if on the plea of *non cepit* the plaintiff prove that the defendant had the cattle in the place laid in the declaration, he will have a verdict; and if the fact be, that the defendant took the cattle in another place, and only had them in the place mentioned in the declaration, in the way to the pound, he ought to plead that matter specially. *Bull. N. P. c.* 4. *fr.* 54.

The general issue in Replevin is *non cepit*; upon which property cannot be given in evidence, for that ought to be pleaded; and if he plead property in himself, he may either plead it in bar, or in abatement; but if he pleads it in a stranger, it ought strictly to be pleaded

in abatement; though it may likewise be pleaded in bar. 2 *Vent.* 249: 1 *Salk.* 5: *Co. Litt.* 145: 2 *Lev.* 92.

If the defendant plead property, whether it be in himself or a stranger, he shall have a return without making an avowry for it; but where the plea in abatement is of a collateral matter, such as *cepit in alio loco*, he must make an avowry in order to have a return; for he must shew a right to the property, or at least to the possession, to have a return; but the plaintiff ought not to traverse the matter of the conusance; and if he do, and demurrer be joined upon it, it is a discontinuance, and the defendant will have judgment. *Salk.* 94: *Bull. N. P.* 54.

The defendant may either avow the taking, or justify it; if he avow, it must be upon a right subsisting, such as rent-arriere, &c. and then he entitles himself to a return; but where, by matter subsequent, he is not to have the thing for which the distress was taken, there he will not be entitled to a return, and therefore cannot avow, but must justify; as, if a lord distrain for homage, and afterwards the tenant die, and then his executor bring Replevin. But a man may distrain for one thing, and avow for another. 3 *Co.* 26, a: *Bull. N. P.* 54, 55.

By *stat. 11 Geo. 2. c. 19. § 22.* any person distraining for rent, relief, heriot, or other service, may in Replevin avow or make cognizance generally, without setting out a title. But this does not extend to an avowry for a rent-charge. 1 *New Rep.* 56.

If a defendant make cognizance as bailiff to *J. S.* the plaintiff may traverse his being bailiff, for this is different from trespass *quare clausum fregit*; for there if the defendant justify an entry by command, or as bailiff to one in whom he alleges the freehold to be, the plaintiff shall not traverse the command, because it would admit the truth of the rest of the plea, *viz.* that the freehold was in *J. S.* which would be sufficient to bar his action. But in trespass *de bonis asportatis*, *e. g.* for taking the plaintiff's sheep, if the defendant justify the taking them, damage-feasant, as servant to *J. S.* the plaintiff may traverse the command or authority; for though *J. S.* had a right to take the cattle, yet a stranger, who had no authority from him, would be liable. And there is a great difference between a justification in trespass, and an avowry in Replevin, in another respect, *e. g.* for an amercement in a court leet; in the justification it is necessary for the defendant to set forth a warrant or precept, &c. but not to aver the matter of the presentment, because his plea is only in excuse: but in avowry he ought to aver, in fact, that the plaintiff committed the crime for which he is amerced; because he is an actor, and is to recover, which must be upon the merits. *Bull. N. P.* 55: cites 1 *Salk.* 107.

If an avowry be made for rent, and it appear by the defendant's own shewing, that part of it is not yet due, yet the avowry will be good for the residue. In such case the avowant must abate his avowry, *quoad* the rent not due, and take judgment for the rest; but if it appear that he has title only to two undivided parts of the rent; the avowry shall abate. 1 *Saund.* 285: *Moor* 281: *Salk.* 580. So if the avowry be for part of a quarter or half a year's rent, he must shew how the rest is satisfied, or it will be bad. *Hardw.* 84: *Comb.* 346: 1 *Saund.* 191. In avowry for rent, and a *nomine pænæ* together, without alleging any demand of rent, the avowry is good for the rent, though it will be ill

for the penalty. 1 *Saund.* 286: *Hob.* 133. Avowry for rent due at a latter day, is no bar to avowry for rent due at a former day: but an acquittal under seal is; if not under seal, contrary proof will be admitted. *Bull. N. P.* 56. See further, this Dictionary, titles *Avowry*; *Rent*; *Distress*.

By *stat.* 21 *H.* 8. c. 19. If the avowry, cognizance, or justification be found for the avowant, or the plaintiff be nonsuited, the defendant shall recover such damages and costs as the plaintiff would have had if he had recovered. But this act mentions only persons avowing or making cognizance, for rent-service, customs, services, damage-feasant, or for other rent or rents; so that it does not extend to an avowry for a *nomine faneæ*, or for an estray; and therefore, if in such, damages and costs were given, the judgment would be reversed. 1 *Jon.* 135; and see *Bull. N. P.* 57.

The avowant or defendant in Replevin, though not within the words is plainly within the meaning of the *stat.* 4 *Ann.* c. 16; (by which a plaintiff in Replevin, which to certain purposes an avowant is, may plead as many pleas as he may think necessary:) And, accordingly, where some issues in Replevin are found for the plaintiff, which entitle him to judgment, and some for the defendant; the latter must be allowed the costs of the issues found for him, out of the general costs of the verdict; unless the Judge certify, that the plaintiff had a probable cause for pleading the matters on which those issues are joined. 2 *Term Ref.* 235.

If issue be joined on the property, the defendant may give in evidence the plaintiff's having the cattle, in mitigation of damages. *Godb.* 98. If the plaintiff plead *riens arrere* in bar to an avowry for rent, he cannot, upon such issue give in evidence *non-tenure*. *Bull. N. P.* 59. In an avowry for rent, the plaintiff may plead a tender and refusal, without bringing the money into court; because, if the distress were not rightfully taken, the defendant must answer the plaintiff his damages. *Bull. N. P.* 60. See also as to payment into court in Replevin, 1 *H. Black.* 24: 1 *Bos. & Pul.* 382: 3 *Bos. & Pul.* 603.

A defendant in Replevin is not entitled to move for judgment as in case of a nonsuit under *stat.* 14 *Geo.* 2. c. 17. § 1. 3 *Term Ref. K. B.* 661: 5 *T. R.* 400.

V. THE original writ of Replevin issues out of chancery, and neither it nor the *alias* Replevin are returnable, but are only in nature of a *justicies*, to empower the sheriff to hold plea in his County-court, when a day is given the parties; but the *pluries* Replevin is always with this clause, *vel causam nobis significes*, and it is a returnable process. *F. N. B.* 69, 70: *Doct. Pl.* 313, 314: 2 *Inst.* 139: *Salk.* 410. It is usual to take out the *alias* and *pluries* at the same time. *Dalt. Sh.* 273.

A *pluries* Replevin returned in *Michaelmas* Term, the defendant claimed property, and nothing was afterwards done, nor any appearance nor continuance till *Easter* Term following at which term they appeared and pleaded, and judgment was thereupon given; though no continuance was between *Michaelmas* and *Easter*, yet this was not any discontinuance, because there is not any continuance, till appearance; for the parties have not any express day in Court, and where there is not any continuance, there cannot be any discontinuance. 1 *Rol. Abr.* 485.

The *pluries* Replevin supersedes the proceedings of the sheriff, and the proceedings are on that, and not on the plaint, as they are when that is removed by *recordari*: and though there is no summons in the writ, yet it gives a good day to the defendant to appear; and if he does not appear, then a *pone* issues, and then a *capias*. 1 *Ld. Raym.* 617.

Capias and process of outlawry lie in Replevin; for when on the *pluries replegiari fac.* the sheriff returns *averia elongata*, then a *capias* in *withernam* issues; and on that being returned *nulla bona*, a *capias* issues; and so to outlawry. *Capias* and process of outlawry in Replevin were given by *stat. 25 Ed. 3. st. 5. c. 17: 6 Mod.* 84.

If on the *pluries* Replevin the sheriff return, that the cattle are eloigned to places unknown, &c. so that he cannot deliver them to plaintiff, then shall issue a *withernam*, directed to the sheriff, commanding him to take the cattle or goods of the defendant, and detain them till the cattle or goods distrained are restored to the plaintiff; and if, on the first *withernam*, a *nihil* be returned, there an *alias* and *pluries* Replevin issue; and so to a *capias* and *exigent*. *F. N. B.* 73.

The writ of *withernam* ought to rehearse the cause which the sheriff returns, for which he cannot replevy the cattle or goods; so that it does not lie on a bare suggestion, that the beasts are eloigned, &c. *F. N. B.* 69. 73. See *ante* III.

If on the *withernam* the cattle are restored to the party who eloigned them, yet he shall pay a fine for his contempt. 2 *Leon.* 147.

Cattle taken in *withernam* may be worked; or, if cows, may be milked; for the party has them in lieu of his own. 1 *Leon.* 220: *Dyer* 280.

And as the party is to have the use of the cattle, he is not to have any allowance made him for the expences he has been at in maintaining them. *Owen* 46: *Cro. Eliz.* 162: 3 *Leon.* 235.

Scire facias against an executor, reciting, that where Replevin was brought against his testator for a cow, and judgment against him *de retorno habendo*, which was not executed, that he should shew cause why he should not have execution. The executor pleads *plene administravit*, upon which the plaintiff demurred; and *Wylde*, Justice, said, that upon the judgment the cow is in the custody of the Law, therefore he ought to have execution; but the doubt is, because the Replevin is determined by the death of the party; (yet by him and *Rainsford*, being only in Court) the plaintiff shall have execution, for the defendant cannot be prejudiced: for if the sheriff return *averia elongata*, he shall not have a *withernam*, but of the goods of the testator; or, if there are no goods of the testator, the sheriff can take nothing, but shall return *nulla bona*, and then the plaintiff hath his ordinary way to charge the defendant if he hath made a *devastavit*; and it was adjudged for the plaintiff. *Pasch.* 20 C. 2. in *B. R.* *Sucklin v. Green.*

W. sues a Replevin, *B.* removes it by *recordari* into the King's Bench, the plaintiff does not declare, and on that a return awarded to *H.* upon which the sheriff returns *averia elongata*, and then a *withernam* was awarded and executed; and now the plaintiff comes and prays he may be admitted to declare, and prays a deliverance of the *withernam*; and it was testified by the clerks, that on the plaintiff's submission to a fine for not declaring, and that being imposed on him by the Judges, he shall have deliverance of the *withernam*; and a fine of 3s. 4d. being accordingly imposed on the

plaintiff, he then declared, and had deliverance. *Noy* 50. The course of *B. R.* is contrary to that of *C. B.*

If, on an *elongata* returned, the sheriff's cattle are taken in *withernam*, yet on the defendant's appearance, and pleading *non cepit*, on claiming property, the defendant shall have his cattle again; and if they are cloigned, a *withernam* against the plaintiff; for if the property or taking be in question, there is no reason that the plaintiff should have the defendant's cattle. 1 *Ld. Raym.* 614.

The *withernam* is but mesne process, and cannot be on execution, because it is granted before judgment. 1 *Ld. Raym.* 614: and see *C mb.* 201: *Salk.* 582.

VI. THE writ of *Second deliverance* is a judicial writ depending upon the first original, and is given by *stat. Westm.* 2. 13 *E.* 1. c. 2; which recites, that, after the return is awarded, the party distrained does replevy again, and so the judgments given in the King's courts take no effect; wherefore it enacts, that when return is awarded to the distrainer the sheriff shall be commanded by a judicial writ to make return, in which it shall be expressed that the sheriff shall not deliver them without writ making mention of the judgment: and it further enacts, that if the party make default again, or, for any other cause, return of the distress be awarded, being now twice replevied, the distress shall remain irreplevisable. See *ante* I.

If a defendant in Replevin has return awarded on nonsuit of a plaintiff, on which he sues a writ *de retorno habendo*, upon which writ the sheriff returns *averia elongata per querentem*, and on this a *withernam* is awarded, and on the *withernam* the defendant has *tot catalla* to him delivered of the goods of the plaintiff, and thereupon the plaintiff sues a Second Deliverance; he shall sue it for the first distress taken, not for the *withernam*; and this by the nature and form of the writ of Second Deliverance. 2 *Roll. Abr.* 435.

If a *retorno habendo* be awarded to the sheriff after a writ of Second Deliverance prayed by plaintiff, this is *supersedeas* to the *retorno habendo*, and closes the sheriff's hand from making any return thereto; and if the sheriff will not execute the writ of Second Deliverance, the party has his remedy against him. *Dyer* 41: *Dalt. Sh.* 275.

The statute of *Westm.* 2. gives the writ of Second Deliverance out of the same court where the first Replevin was granted, and a man cannot have it elsewhere; for if he may, then he shall vary from the place limited as to this by the statute. *Plowd.* 206.

In Replevin a defendant avowed, that the plaintiff being nonsuited brought a writ of Second deliverance, whereupon it was moved to stay the writ of Inquiry of Damages: And *per curiam*, this is a *supersedeas* to the *retorno habendo*, but not to the writ of Inquiry of Damages; for these damages are not for the thing avowed for, but are given by *stat.* 21 *H.* 8. c. 19. as a compensation for the expence and trouble the avowant has been at. 1 *Salk.* 95. See *Palm.* 403: *Latch.* 72.

Error of judgment in *C. B.* in a Second Deliverance on demurrer in pleading, the error assigned was, because there was not any writ of Second Deliverance certified: and *in nullo est erratum* being pleaded, it was moved not to be material, because it is awarded on the roll, and the parties had appeared and pleaded to it; but it was adjudged ill, and reversed for that cause; for there ought to be a writ, and if

it vary from the declaration in the replevin, it shall be abated. *Cro. Jac.* 424.

No Second Deliverance lies after a judgment on a demurrer, or after verdict, or confession of the avowry; but, in all these cases, the judgment must be entered with a return irreplevisable; but on a nonsuit, either before or after evidence, a Second Deliverance will lie, because there is no determination of the matter, and there a writ of Second Deliverance lies to bring the matter in question; but, in the case of demurrer and verdict, the matter is determined by confession of the party. 2 *Lill. Reg.* 457.

If the plaintiff's writ abates; he may have a new writ, and is not put to his writ of Second Deliverance. *Com.* 122.

If the plaintiff in Replevin be non-suited for want of delivering a declaration, if it happened through sickness of the person employed to prosecute, the Court will order the defendant to accept a declaration on payment of costs; otherwise plaintiff would be remediless, the writ of Second Deliverance being taken away by *stat. 17 C. 2. c. 7.* in case of distresses for rent arrear. See *ante*. I.

If the person taking the goods claims property, the sheriff cannot make Replevin of them; for property must be tried by Writ, and in this case the plaintiff may have the writ *de proprietate probandâ* to the sheriff; and if it be found for the plaintiff, then the sheriff is to make Replevin; if for the defendant, then he is to proceed no further; but as this is but an inquest of office, though the property be found in the defendant, yet the plaintiff is not concluded, for he may still have his action of Replevin, or of trespass: But if in his action of Replevin the defendant plead property, and it be found for him, the plaintiff is concluded: And if the sheriff return the claim of property, yet shall it proceed in *C. B.* where the property shall be put in issue, and finally tried. *Co. Litt.* 145, b.: *F. N. B.* 77: *Dyer* 173: *Com.* 592: *Bull. N. P.*

None but he who is party to the Replevin shall have the writ *de proprietate probandâ*; so that if on a Replevin the beasts of a stranger are delivered to the plaintiff, such stranger, being no party to the Replevin, shall not have this writ. 14. *Hen.* 4. 25: 2 *Roll. Abr.* 431.

The sheriff is to return the claim of property on the *pluries*, before which time the writ *de proprietate probandâ* does not issue, for it recites the *pluries*. *Reg.* 83: *Com.* 595.

The writ *de proprietate probandâ* is an inquest of office, and the sheriff is to give notice to the parties of the time and place of executing it. *Dalt. Sh.* 274.

If the defendant claims property in Replevin, the plaintiff may have the writ *de proprietate probandâ* without continuance of the Replevin, though it be two or three years after; because, by claim of property, the first suit is determined. *Moor* 403.

If the plaintiff has property, and omits to claim it before the sheriff, he may notwithstanding plead property in himself or in a stranger, either in abatement or in bar; though it was formerly held, that property in a stranger could only be pleaded in abatement. *Cro. Eliz.* 475: *Winch.* 26: 1 *Show.* 402: *Salk.* 594: 6 *Mod.* 81.

In Replevin the defendant in his avowry pleads, that the beasts taken belong to a third person, and not to the plaintiff, therefore prays a return; to which the plaintiff demurs; for on the avowant's own shewing he ought not to have return, having admitted the property of the beasts to be in another; but judgment was given for the

defendant; for the prior possession was in him, and he hath a right against all others but the right owner, and the plaintiff by his demurrer hath admitted, that he hath no property in them. *Com.* 477: See 6 *Mod.* 68. 139; 2 *Mod.* 242.

VII. THE *retorno habendo* is a judicial writ which lies for him who has avowed the distress, and proved the same to be lawfully taken; or where, on removal of the plaint into the courts above, the plaintiff, whose cattle were replevied, makes default, or does not declare or prosecute his action; and thereby becomes nonsuited, &c. and by this writ the sheriff is commanded to make a return of the cattle to the defendant in the Replevin. 35 *Hen.* 6. 40: *Dyer* 280: *Co. Litt.* 145. See *ant.* I.

A bailiff who makes conusance may have judgment of a return, and consequently a writ *de retorno habendo* grounded on such judgment, *Co. Ent.* 59.

If a defendant hath a return awarded him, and he sueth a writ *de retorno habendo*, and the sheriff return on the *pluries, quod averia elongata sunt*, &c. he shall have a *scire facias* against the pledges, &c. according to the statute of *West.* 2; and if they have nothing, then they shall have a *withernam* against the plaintiff, of the plaintiff's own cattle. *F. N. B.* 172.

Since the *stat.* 17 *Car.* 2. c. 7. (see *ante* I.) it has been the custom, as it was before, to enter judgment for a *retorno habendo*: but, notwithstanding, the defendant may enter a suggestion on that statute, and a writ of Second Deliverance will be no *supersedeas* to such writ. The whole fact is to be proved, and may be litigated in the writ of Inquiry, directed by that statute. *Bull. N. P.* 58. And if the Jury, impaneled to try a cause in Replevin, omit to inquire the value of the rent arrear, or of the distress, according to the directions of the said statute, it cannot be supplied by a writ of Inquiry, because the statute confines the inquiry to the Jury impaneled in the cause. Therefore, in such case, the defendant must take judgment *de retorno habendo* at Common Law: but it is not the same upon *stat.* 21 *H.* 8. c. 19; (see *ante* IV. 2;) nor upon *stat.* 43 *Eliz.* c. 2. if the defendant avow as overseer for a distress for a poor's rate; because, if the jury had inquired, it had been as an inquest, on which no attain would have lain, and the statute does not tie it up to the same jury. And if the plaintiff, being nonsuited, bring a writ of *Second Deliverance*, though it will be a *supersedeas* to the writ *de retorno habendo*, yet it will be none to the writ of Inquiry. *Bull. N. P.* 58.

A Judgment in Replevin, "that the defendants have a return of the cattle, and recover their damages and costs assessed by the jury, &c." is good either as a judgment at Common Law, though the Return be not judged irreplevisable, or as a judgment under *stat.* 21 *H.* 8. c. 19. which entitles the defendant to damages and costs. 4 *Term Rep.* *K. B.* 509. See *ante* IV. 2.

Return irreplevisable is a judicial writ, directed to the sheriff, for the final restitution or return of cattle unjustly taken by another, and so found by verdict, or after a nonsuit in a Second Deliverance. 2 *Roll. Abr.* 434.

If the plea be to the writ, or any other plea be tried by verdict, or judged on demurrer, return irreplevisable shall be awarded, and no

new Replevin shall be granted, nor any Second Deliverance by the *stat. West. 2.* but only on nonsuit. 2 *Inst.* 340: *Dyer* 280. See I. V.

If, on issue joined in Replevin, the plaintiff does not appear on the trial, being called for that purpose, yet return irreplevisable shall not be awarded, as in case of a verdict's being given, but the party may have a writ of Second Deliverance, as well as if it had been a non-suit before declaration, or appearance. 3 *Leon.* 49. See *ante* VI.

If a man has return irreplevisable, and a beast die in the pound, he may distrain anew, so, if the beast die before judgment. *Hob.* 61.

If return irreplevisable be awarded, the owner of the cattle may offer the arrears; and if the defendant refuses to deliver the distress, the plaintiff may have his action of detinue, because the distress is only in nature of a pledge. 1 *Ld. Raym.* 720.

By the statute of *Westm. 1.* 3 *E. 1. c.* 17. If the party who distrains, conveys the distress into any house, park, castle, or other place of strength, and refuses to suffer them to be replevied, the sheriff may take the *posse comitatus*, and, on request and refusal, break open such house, castle, &c. and make deliverance; and this was a necessary law so soon after the irregular time of *Hen. III.* 2 *Inst.* 193: 5 *Co.* 93: *Dalt. Sh.* 373.

If the sheriff returns, that the beasts are inclosed in a park among savages, or inclosed in a castle, &c. he shall be amerced, and another writ of Replevin shall be awarded; for he ought to have taken the *posse com.* for this was a denial. *F. N. B.* 257.

If the sheriff return, *quod mandavi ballivo libertatis*, &c. *qui nullum dedit mihi responsum*, or that the bailiff will not make deliverance of the cattle, these are not good returns; for by statute of *West. 1.* the sheriff, on such return made to him by the bailiff, ought presently to enter into the franchise, and make deliverance of the cattle taken. *F. N. B.* 157.

If a man sue a Replevin in the County-court without writ, and the bailiff return to the sheriff, that he cannot have view of the cattle to deliver them, the sheriff, by inquest of office, ought to inquire into the truth thereof; and if it be found by a jury, that the cattle are eloigned, &c. the sheriff in the County-court may award a *withernam* to take the defendant's cattle; and if the sheriff will not award a *withernam*, then the plaintiff may have a writ out of Chancery, directed to the sheriff, rehearsing the whole matter, commanding him to award a *withernam*, &c.; and he may have an *alias*, and after a *pluries*, and an attachment against the sheriff, if he will not execute the King's command. *F. N. B.* 158.

If the sheriff return, *quod averia elongata ad locum incognitum*, this is a good return, and the party must pursue his writ of *withernam*; but if the sheriff return *averia elongata ad locum incognitum infra comitatum meum*, he shall be amerced, for the Law intends that he may have notice in his county. *Bro. Retur. de Br. fil.* 100.

If in Replevin the sheriff return, *quod averia morta sunt*, that is a good return. *Bro. Retur. de Br. fil.* 125.

If the sheriff be shewn a stranger's goods, and he takes them, an action of trespass lies against him, for otherwise he could have no remedy; for being a stranger he cannot have the writ *de proprietate probandâ*, and were he not entitled to this remedy, it would be in the power of the sheriff to strip a man's house of all his goods; but *Kiel-*

way seems to hold, that the action lies more properly against the person who shews the goods. 2 *Roll. Abr.* 552: *Com.* 596.

The sheriff comes to make Replevin of beasts impounded in another man's soil; if the place be inclosed, and has a gate open to the inclosure, he cannot break the inclosure, and enter thereby, when he may enter by the open gate; but if the owner hinders him so that he cannot go by the open gate for fear of death, he may break the inclosure, and enter there. 20 *Hen.* 6. 28: 2 *Roll. Abr.* 532.

The sheriff is to return, that the cattle are eloigned, or that no person came to shew, &c. or a delivery; but he cannot return, that the defendant *non cepit* the cattle, because it is supposed in the writ, and is the ground of it, which the sheriff cannot falsify. 1 *Ld. Raym.* 613: 1 *Lutw.* 581.

For further information on this subject, see *Vin. Abr.* title *Replevin*.

REPLEVISH, To let one to mainprise on surety. *Stat.* 3 *Ed.* 1. c. 11.

REPLICATION, *Replicatio*.] An exception or answer made by a plaintiff to a defendant's plea. And it is also that which the complainant replies to the defendant's answer in Chancery, &c. *West. Symb. par.* 2. See title *Pleading* I. 2: and as to Replications in criminal cases, see *Pleading* II.

REPORT, from Lat. *reportare*.] A public relation, or bringing again to memory, of cases judicially adjudged in Courts of Justice, with the reasons as delivered by the Judges. *Co. Litt.* 293. See title *Law Books*.

There are likewise Reports, when the Court of Chancery, or other Court, refer the stating some case, settling some account, &c. to a Master of Chancery, or other referee, his certificate therein is called a Report. This Report may be excepted to, disproved, or overruled; or otherwise it is confirmed and made absolute, by order of the Court. See 3 *Comm.* 453.

A master in Chancery, having an order of reference, is to issue his summons for the parties to attend him at a certain time and place; when and where they may come with their counsel, clerk, or solicitor, to defend themselves, and maintain, or object against, his Report, or certificate, &c. And Masters are to draw their Reports briefly and as succinctly as may be, preserving the matter clearly for the judgment of the Court; without recital of the several points of the order of reference, or the debates of Counsel before them; unless in cases doubtful, when they may shortly represent the reasons which induce them to what they do.

None shall take any money for report of an order, or cause, referred to them by any Judges, on pain of 100*l.* &c. so as not to prohibit the clerk from taking 12*d.* for the first, and 2*d.* for every other sheet. *Stat.* 1 *Jac.* 1. c. 10.—But by *stat.* 13 *Car.* 2. *st.* 1. c. 12. Masters in Chancery, may take for every Report, or certificate, made on an order on hearing of a cause, 20*s.* And for any other Report, &c. made on petition or motion, 10*s.* And their clerks shall have 5*s.* for writing every Report. See further, title *Reference*.

A Report by a Master in Chancery, is as a judgment of the Court. 1 *P. Wms.* 653.

By a standing order of the Court of Chancery, made by the Lords Commissioners, in the 4 *H. & M.* it was directed, that all Reports

should be filed within four days after the making, otherwise no decree or proceedings to be had thereupon; but the Register reporting, that it was sufficient if the Report were filed before any proceedings had thereupon, though not done within four days after making, *Ld. C. J. King*, agreed thereto. And the Court took it to be well enough; though, in this case, the motion to confirm the Report, *nisi causa*, was made the same day that the Report was filed. 2 *P. Wms.* 517.

It is not usual to confirm Reports of Receiver's accounts, *per* Master of the Rolls. 2 *P. Wms.* 661.

There are also Reports from Committees of both, or either, Houses of Parliament. See title *Parliament*.

REPOSITION OF THE FOREST, *Repositio Forestæ*, i. e. a re-putting to.] A statute, whereby certain Forest-grounds, being made *jurlicu*, on view, were, by a second view, put to the Forest again. *Manw. par.* 1.

REPOSITION, or *Retrocession*, the returning back of a right assigned from the assignee, to the person granting the right. *Scotch Dict.*

REPOSITORIUM, *Lat.*] A storehouse or place wherein things are kept; a warehouse. *Cro. Car.* 555.

REPRESENTATION, *Representatio*.] The personating another: There is an heir by Representation, where a father dies in the life of the grandfather, leaving a son, who shall inherit his grandfather's estate, before the father's brother, &c. *Bro. Abr.* 303. Also, executors represent the person of the testator, to receive money and assets. *Co. Litt.* 209. See titles *Heir*; *Executor*.

The term *Representation* is also used to express the written pleading presented to a Lord Ordinary of the Court of Session in *Scotland*, when his judgment is brought under Review.

REPRIEVE, from the Fr. *Repris*.] The taking back or suspending a prisoner from the execution and proceeding of Law for that time. *Terms de Ley*. See title *Execution of Criminals*.

REPRISAL, *Reprisale*; *Reprisalia*.] The taking one thing in satisfaction for another, derived from the Fr. *Reprise*; and is all one in the Common and Civil Law.

Reprisals are ordinary and extraordinary; ordinary reprisals are to arrest and take the goods of merchant-strangers within the realm; and the other is for satisfaction out of the realm, and is under the Great Seal, &c. *Lex Mercat.* 120.

If any person be killed, wounded, spoiled, or any ways damaged in a hostile manner, in the territories of any potentate, to whom letters of request are transmitted, and no satisfaction be made, there is no necessity to resort to the ordinary prosecution, but letters of reprisal issue forth; and the prince against whom the same are issued is obliged to make satisfaction out of the estates of the persons committing the injuries; and in case of a deficiency there, it will then be adjudged a common debt on his country. But where misfortunes happen to persons, or their goods, residing in a foreign country in time of war, reprisals are not to be granted: In this case they must be contented to sit down under the loss, for they are at their liberty to relinquish the place on the approach of the enemy, when they foresee the country is subject to spoil: and if they continue, they must partake of the common calamity. *Lex Mercat.*

Reprisals may be granted on illegal prosecutions abroad; where

wrong judgment is given in matters not doubtful, which might have been redressed, either by the ordinary or extraordinary power of the country or place, and which was apparently denied, &c. See further, title *Letters of Marque*; and as to *Reprisal of Goods*, see title *Recap-tion*.

REPRISES, Fr. *Resumptions*, taking back.] Is used for deductions and payments out of a manor or lands, as rent-charges, annuities, &c. Therefore when we speak of the clear yearly value of a manor, or estate, or land, we say it is so much *per annum*, *ultra Reprises*, besides all Reprises.

REPROBATOR, action of; an action intended to convict a witness of perjury in *Scotland*: to which action the witness must be made a party. *Bell's Scotch Dict.*

REPUBLICATION OF WILLS; See title *Will*.

REPUGNANT, *Repugnans*.] What is contrary to any thing said before: Repugnancy in deeds, grants, indictments, verdicts, &c. make them void. 3 *Nels.* 135. See title *Deeds*, &c.

The common law abhors repugnancies, and all incongruities; but the former part of a deed, &c. shall stand, where the latter part is repugnant to it. *Jenk. Cent.* 251. 256.

Where contrarieties are in several parts of deeds or fines, the first part shall stand; in wills, the last, if the several clauses are not reconcileable. *Jenk.* 96. *fil.* 86.

In contracts, gifts, verdicts, evidences, &c. where direct contrarieties are for the same thing at the same time, all is void. *Jenk.* 96. *fil.* 86.

A *proviso*, good in the commencement, may by consequence become repugnant, as grant of rent by deed for life, provided that it shall not charge his person; the *proviso* is good, but if the rent be arrear, and the grantee die, his executors shall charge the person of the grantor in debt; for otherwise they be remediless; and so it is now repugnant, by consequence void. 6 *Rep.* 41, *b.* See further, titles *Condition*; *Proviso*.

REPUTATION, *Reputatio*.] Is defined by *Coke* to be *vulgaris opinio ubi non est veritas*. 4 *Rep.* 104. That is not Reputation which this or that man says; but that which generally hath been, and many men have said or thought. 1 *Leon.* 15.

A little time is sufficient for gaining reputation, which needs not a very antient pedigree to establish it; for general acceptance will produce a reputation. *Cro. Jac.* 308. But it has been held, that common reputation cannot be intended of an opinion which is conceived of four or five years, standing; but of long time. And some special matter must be averred to induce a reputation. 2 *Lill. Abr.* 464.

Land may be reputed parcel of a manor, though not really so. 1 *Vent.* 51: 2 *Mod.* 69: 3 *Nels. Abr.* 137. And there is a parish, and office, in Reputation, &c.

REPUTATION OR FAME, Is under the protection of the law, as all persons have an interest in their good name; and scandal and defamation are injurious to it, though defamatory words are not actionable, otherwise than as they are a damage to the estate of the person injured. *Wood's Inst.* 37. See *Libel*.

The security of Reputation, or good name, from the arts of detraction and slander, are rights to which every man is entitled, by reason and natural justice; since, without these, it is impossible to

have the perfect enjoyment of any other advantage or right. 1 *Comm.* 134. See title *Liberty*.

REQUEST, of things to be done: Where one is to do a collateral thing, agreed on making a contract, there ought to be a request to do it. 2 *Lill. Abr.* 464. If a duty is due, it is payable without Request: on promise to pay a duty precedent on Request, there needs no actual Request; but on a promise for a penalty, or collateral sum, there should be an actual Request before the action is brought. *Cro. Eliz.* 74: 1 *Saund.* 33: 1 *Lev.* 289.

If a debt is before a promise, a Request is not necessary, for then a Request is not any cause of the action; though upon a promise generally to pay on Request, the action arises on Request, and not before. *Cro. Jac.* 201: 1 *Lev.* 48. See *post*.

Action of debt for money due on a bond, may be brought without alleging a special Request. *Cro. Eliz.* 229. 523.

A man promises to re-deliver, on Request, such goods as were delivered to him; if an action of detinue is brought, the plaintiff need not allege a special Request, because the action is for the thing itself; but if an action on the case is had for these goods, then the Request must be specially alleged; as it is not brought for the thing itself, but for damages. *Sid.* 66: 3 *Salk.* 309.

If a promise is made to pay money to the plaintiff, on Request, no special Request is required: But where there are mutual promises between two persons to pay each other money on Request, if they do not perform such an award, the Request is to be specially alleged. And if there is a promise to pay money to a man on Request, and he dies before any Request made, it shall be paid to his executors; but not till request made. 3 *Salk.* 309: 3 *Bulst.* 259.

Where a person promises to pay a precedent duty, the general allegation is sufficient, because there was a duty without a promise: As for instance; if one buys or borrows a horse, and promises to pay so much on Request: But where the promise is collateral, as to pay the debt of a stranger on Request, &c. the Request is part of the agreement, and traversable, there being no duty before the promise made; and for that reason the request must be specially alleged, for bringing the action will not be a sufficient Request. *Latch.* 93: 3 *Leon.* 200: 3 *Salk.* 308.

Where the thing is a duty before any Request made, a Request is only alleged to aggravate damages, and such Request is not traversable; but if the Request makes the duty, as in *assumpsit* to do such a thing on Request, there the day, &c. of the Request ought to be alleged, because it is traversable. *Palm.* 389.

If a Request is to be specially made, the day and year when made should be specially alleged. 1 *Lutw.* 231: 2 *Lill. Abr.* 466: *Cro. Car.* 280. But where a person is not restrained to make the Request by a time limited, if made at any time during his life, it has been held to be good. *Cro. Eliz.* 136. And a Request at any other time than named may be given in evidence. *Sid.* 268.

If a debt or duty does not accrue on a promise, until Request made, the Statute of Limitations runs from the time of the Request, only, and not from the time of the precedent promise. *Cro. Car.* 98. See title *Limitation of Actions*.

Unreasonable Requests are not regarded in Law; and there is no

difference where a thing is to be done on Request, and reasonable Request. *Dyer* 218: *Cro. Car.* 176: 3 *Nels. Abr.* 140. 142. See titles *Action; Declaration; Pleading; Rent, &c.*

REQUESTS, Court of; See *Court of Requests*.

REQUISITION; In *Scotch Law*, a notarial demand of a debt made by a creditor, in consequence of a clause in the securities for debt previous to the Reformation, when a personal obligation was deemed illegal. *Bell's Scotch Dict.*

REER COUNTY; See *Rier County*.

RESCEIT, or RECEIT, *Receptio*] An admission or receiving of a third person to plead his right in a cause formerly commenced between two other persons; as, where an action is brought against tenant for life or years, or any other particular tenant, and he makes default, in such case he in the Reversion may move that he may be received to defend his right, and to plead with demandant.

Resceit is likewise applied to the admittance of a plea, where the controversy is between the same two persons. *Broke* 205: *Co. Litt.* 192: 3 *Nels. Abr.* 146.

He in reversion may come into Court, and pray to be received in a suit against his particular tenant; and after such Resceit the business shall be hastened, as much as may be by Law, without any delay of either side. *Stat.* 13 *R. 2. c.* 17. But Resceit is admitted only for those who have estates depending on particular estates for life, tenants by the curtesy, or after possibility, &c. and not for him in remainder after an estate-tail, which is perdurable. 1 *And.* 133.

Husband and wife were tenants for life, remainder to another in fee; a *formedon* was brought against the husband, who made default after default; and thereupon the wife prayed that she might be received to defend her right; but it was denied by the Court, because, if defendant should recover against her husband, it would not bar her right if she survived him, therefore it would be to no purpose. Then he in remainder prayed to be received, which at first the Court doubted, by reason if the husband should recover he might falsify such Recovery; and because his estate did not depend on the estate of the husband alone, but on the estate of the husband and wife; but at last he was received. 1 *Leon.* 86.

The statute of *Gloucester*, 6 *E. 1. c.* 11. enacts, that a termor may be received to falsify, if he hath a deed, and comes before judgment; this is where he in reversion causeth himself to be impleaded by collusion, to make the termor lose his term, &c. And by *stat.* 20 *E. 1. st.* 3. if any stranger come in by a collateral title, before he is received, he shall find surety to satisfy the demandant the value of the lands, if he recovers from that time till final judgment; and demandant recovering, he shall be grievously amerced, &c.

RESCEIT OF HOMAGE, *Receptio Homagii*.] The lord's receiving Homage of his tenant, at his admission to the land. *Kitch.* 148. See title *Homage*.

RESCISSORY ACTION; An action to rescind a contract, one of the principal divisions of Actions in the Law of *Scotland*, and includes all those by which Deeds, &c. are declared void.

RESCOUS, or RESCUE.

RESCUSSUS, from the Fr. *Rescousse*, i. e. *Liberatio*.] A resistance against lawful authority.

I. *Of the different Kinds of Rescues, &c.*

II. *Of the Offence of making Rescue of a Prisoner; and how the Offenders are to be proceeded against, and punished. And see title Escape (B) IV. 3.*

III. *Of the Form of the Proceedings on a Rescue.*

IV. *In what Cases the Sheriff may return a Rescue; of the Form of a Return, and for what Defects it may be quashed.*

I. IN the case of a distress, the goods being, from the first taking, considered as in the custody of the Law, and not merely in that of the distrainor, the taking them back by force is looked upon as an atrocious injury, and denominated a *Rescous*; for which the distrainor has a remedy in damages, either by writ of *Rescous*, in case they were going to the pound; or by writ *de farco fracto*, or Pound-breach, in case they were actually impounded. *F. N. B.* 100, 101. He may also, at his option, bring an action on the case for this injury, and shall therein, if the distress were taken for rent, recover treble damages. *Stat. 2 W. & M. c. 5*: see *post.* II.; and this Dictionary, titles *Distress*; *Rent*; *Replevin*; *Pound-breach*.

The term *Rescous* is likewise applied to the forcible delivery of a defendant, when arrested, from the officer who is carrying him to prison. In which circumstances, the plaintiff has a similar remedy by action on the case, or of *Rescous*; or if the sheriff makes a return of such *Rescous* to the Court out of which the process issued, the Rescuer will be punished by attachment. *6 Mod.* 211. *Cro. Jac.* 419: *Salk.* 586. See *3 Comm. c. 9*: and *post.* II. III. IV.

If a bailiff, or other officer, on a writ, arrest a man, and others by violence take him away, or procure his escape; this is a *Rescous* in fact. So, if one distrain beasts damage-feasant, in his ground, as he drives them in the highway towards the pound, they enter into the owner's house, and he withholds them there, and will not deliver them on demand, this detainer is a *Rescous* in Law. *Co. Litt. lib. 2. c. 12.* 161. *Cassaneus*, in his book *De Consuetud. Barg. f.* 294. hath the same words coupled with *resistentia*.

In other terms, *Rescue* is the taking away and setting at liberty, against Law, any distress taken for rent, or services, or damage-feasant; but the more general notion of *Rescous* is, the forcible freeing another from an arrest, or some legal commitment; which, being an high offence, subjects the offender not only to an action at the suit of the party injured, but likewise to fine and imprisonment at the suit of the King. *Co. Litt.* 160: *F. N. B.* 226. See *post.* II.

But there can be no *Rescous* but where the party has had the actual possession of the cattle, or other things whereof the *Rescous* is supposed to made; for if a man come to arrest another, or to distrain, and is disturbed, regularly his remedy is by action on the case. *Co. Litt.* 161, *a*: *Litt. Rep.* 296: *Hell.* 145.

If on *fi. fa.* the sheriff seizes goods, which are taken away by a stranger, this is not properly a *Rescue*; for by seizure of the goods, by virtue of the *fi. facias*, the sheriff has a property in them, and

may maintain trespass, or trover, for them: also the party injured may have an action on the case against the wrong-doer. *Hettl.* 145: *Litt. Ref.* 296.

If the lord distrain for Rent when none is due, the tenant may lawfully make Rescous; so may a stranger, if his beasts be distrained when no rent is due. So, if the tenant tender the Rent when the lord comes to distrain, and yet he does distrain, or if he distrain any thing not distrainable, as beasts of the plough, when other sufficient distress may be taken, the tenant may make Rescous; so, if the lord distrain in the highway, or out of his fee. *Co. Litt.* 47: 160, *b*: 161, *a*.

But though there must be reason for the distress, and that otherwise the Rescue cannot be unlawful, yet it hath been held, in a *parco fracto*, that a defendant cannot justify breaking the pound and taking out the cattle, though the distress was without cause, because they are now in the actual custody of the law. *Salk.* 247.

There is a difference between a man's being arrested by a warrant on record, and by a general authority in Law; for if a *capias* be awarded to the sheriff to arrest a man for felony, though he be innocent, he cannot make Rescue; but if the sheriff will, by the general authority committed to him by Law, arrest any man for felony, if he be innocent he may rescue himself. *Co. Litt.* 161. See 5 *Co.* 68: 6 *Co.* 54: *Cro. Jac.* 486.

II. RESCUE is classed by *Blackstone*, amongst offences against public justice; and is defined to be the forcibly and knowingly freeing another from an arrest or imprisonment: and it is generally the same offence in the stranger so rescuing as it would have been in a gaoler to have voluntarily permitted an escape. A Rescue, therefore, of one apprehended for felony, is felony; for treason, treason; and for a misdemeanor, a misdemeanor also. But here, likewise, as upon voluntary escapes, the principal must be first attainted, or receive judgment, before the Rescuer can be punished; and for the same reason, because perhaps, in fact it may turn out that there has been no offence committed. 4 *Comm. c.* 10. *p.* 131: 1 *Hal. P. C.* 607: *Fost.* 344. And see this Dictionary, title *Escape*.

By *stat.* 16 *Geo.* 2. *c.* 31. to convey to any prisoner, in custody for treason or felony, any arms, instruments of escape, or disguise, without the privity of the gaoler, though no escape be attempted; or any way to assist such prisoner to attempt an escape, though no escape be actually made, is felony and subjects the offender to transportation for seven years: or if the prisoner be in custody for petty larceny, or other inferior offence, or charged with a debt of 100*l.* it is then a misdemeanor, punishable with fine and imprisonment. See title *Escape* (B) IV. 3.

By several special statutes, to rescue or attempt to rescue, any person committed for the offences enumerated in those acts, is felony without benefit of clergy. See *stats.* 6 *Geo.* 1. *c.* 23. § 5: 24 *Geo.* 3. *c.* 56. as to *Transportation*; and this Dictionary under that title, and title *Escape*: *Stats.* 9 *Geo.* 1. *c.* 22: 27 *Geo.* 2. *c.* 15; as to offences against the *Black Act*; *stat.* 8 *Geo.* 2. *c.* 20, as to destroying turnpikes; and this Dictionary, title *Highways* VI, (B) 10; *stat.* 19 *Geo.* 2. *c.* 34, as to *Smuggling*; *stat.* 25 *Geo.* 2. *c.* 37: 43 *Geo.* 3. *c.* 58. as to *Murder*.

Under 25 *Geo.* 2. *c.* 37. to rescue, or attempt to rescue, the body of a felon executed for murder, is single felony, punishable by trans-

portation for seven years; and a like punishment is inflicted by *stats.* 11 *Geo.* 2. c. 26. 24 *Geo.* 2. c. 40. § 28; against persons assembling, to the number of *five*, or more, to rescue any unlawful retailers of spirituous liquors, or to assault the informers against them.

Even if any person, charged with any of the offences against the *Black Act*, *stat.* 9 *Geo.* 1. c. 22. and being required by order of the Privy Council to surrender himself, neglects so to do for forty days, both he and all that knowingly conceal, aid, abet, or succour him, are declared felons without benefit of clergy.

By 43 *Geo.* 3. c. 58. to shoot at, &c. any person with intent to rescue any offender is felony without benefit of clergy. See title *Homicide*.

It seems agreed, that the rescuing a person imprisoned for felony, is also felony by the Common Law. 1 *Hal. P. C.* 606.

Also it is agreed that a stranger who rescues a person committed for, and guilty of, high treason, knowing him to be so, is in all cases guilty of high treason. *Staundf. P. C.* 11: 1 *Jon.* 455. Whether he knew that the prisoners were so committed or not. *Cro. Car.* 583.

To make a Rescue felony, it is necessary that the felon be in custody, or under arrest for felony; therefore if *A.* hinder an arrest, whereby the felon escapes, the township shall be amerced for the escape, and *A.* shall be fined for the hindrance of his taking; but is not felony in *A.* because the felon was not taken. 1 *Hal. P. C.* 606: 3 *Ed.* 3. *Coron.* 333: *Staundf.* 31.

So, to make a Rescue felony, the party rescued must be under custody for felony, or suspicion of felony; and it is all one whether he be in custody for that account by a private person, or by an officer, or warrant of a Justice; for where the arrest of a felon is lawful, the Rescue of him is felony; but it seems necessary that he should have knowledge that the person is under arrest for felony, if he be in the custody of a private person. 1 *Hal. P. C.* 606.

But if he be in the custody of an officer, there at his peril, he is to take notice of it; so if there be felons in a prison, and *A.* not knowing it, breaks the prison, and lets out the prisoners, though he knew not that there were felons there, it is felony. 1 *Hal. P. C.* 606: *Cro. Car.* 383.

A person committed for high treason, who breaks the prison, and escapes, is guilty of felony only; unless he lets others also escape, whom he knows to be committed for high treason; in which case he is guilty of high treason, not in respect of his own breaking of prison, but of the Rescous of the other. 2 *Hawk. P. C.* c. 21. § 7.

If the person rescued were indicted or attainted of several felonies, yet the escape or Rescue of such a person makes but one felony. 1 *Hal. P. C.* 599.

Wherever the imprisonment is so far groundless or irregular, or the breaking of a prison is occasioned by such a necessity, &c. that the party himself, breaking prison, is either by the common law, or by the statute *de frangentibus prisonam*, saved from the penalty of a capital offender, a stranger who rescues him from such imprisonment is, in like manner also excused; & *sic è converso*. 2 *Hawk. P. C.* c. 21. § 6.

The return of a Rescue of a felon, by the sheriff against *A.* is not sufficient to put him to answer for it as a felony, without indictment or presentment, by the statute 25 *E.* 3. *st.* 5. c. 4: 1 *Hal. P. C.* 606.

As in case of an escape, so in case of a Rescue, if the party rescued be imprisoned for felony, and rescued before indictment, the indictment must surmise a felony done, as well as an imprisonment for felony, or suspicion thereof; but if the party be indicted, and taken by a *capias*, and rescued, then there needs only a recital that he was indicted *prout*, and taken and rescued. 1 *Hal. P. C.* 607.

Though the Rescuer may be indicted, before the principal is convicted and attainted, yet he shall not be *arraigned* or *tried* before the principal be attainted; but if the person rescued were imprisoned for high treason, the Rescuer may immediately be *arraigned*, for in high treason all are principals: *Sed quare*.—But it seems that he may be immediately proceeded against for a misprision only, if the King please. 2 *Hawk. P. C. c.* 21. § 8.

The Rescuer of a prisoner for felony, though not within clergy, yet shall have his clergy. 1 *Hal. P. C.* 607. unless where it is otherwise declared by statute.

As the offence of rescuing persons in cases of high treason and felony is usually punished by indictment, so the offence of rescuing a person arrested on mesne process, or in execution after judgment, subjects the offender to a writ of Rescous, or a general action of trespass *vi & armis*, or an action on the case, in all which damages are recoverable. Also it is the frequent practice of the Courts to grant an attachment against such wrong-doers, it being the highest violence and contempt that can be offered to the process of the Court. *Co. Lit.* 161: *Co. Ent.* 614: *Rast. Ent.* 577.

He who rescues a prisoner from any of the Courts of *Westminster Hall*, without striking a blow, shall forfeit his goods and profits of his lands, and suffer imprisonment during life: but not lose his hand, because he did not strike. 22 *Ed.* 3. 13: 3 *Inst.* 141: 1 *Hawk. P. C. c.* 21. § 5.

It is clearly agreed, that for a Rescous on mesne process, the party injured may have either an action of trespass *vi et armis*, or an action on the case, in which he shall recover his debt and damages against the wrong-doer; and the rather, because on mesne process he can have no remedy against the sheriff. *Cro. Jac.* 486: *Hob.* 180. See *post.* IV.

Also it hath been adjudged, that for Rescous of a person in execution on a *ca. sa.* or *ca. utlag.* an action will lie against the Rescuer, though the party injured hath his remedy against the sheriff, and the sheriff hath his remedy against the wrong-doer; for perhaps the sheriff may be dead or insolvent; but herein it hath been held, that if he bring his action against the party who made the Rescue, he may plead it in bar to an action brought by the sheriff; so, if against the sheriff, or his bailiff, they may plead that he had satisfaction from the party, so that if he recovers against one, the other is discharged. *Hell.* 95: *Cro. Car.* 109: *Hut.* 38: *Hob.* 180.

By *stat.* 2 *W. & M. st.* 1. c. 5. § 5. on Pound-breach, or Rescous of goods distrained for rent, the person grieved shall in a special action on the case, recover treble damages and costs against the offenders, or against the owner of the goods, if they come to his use.

In an action on the case for a Rescous, on the statute, it hath been held, that the plaintiff shall recover treble costs as well as treble damages, for the damages are not given by the statute, but increased;

an action on the case lying for a Rescous at Common Law. 1 *Salk.* 205.

An attachment will be granted not only against a common person, but even against a peer of the realm, for rescuing a person arrested by due course of Law: so that if the sheriff in any case return to the Court, that a person arrested, or goods seized, or possession of lands delivered by him, by virtue of the King's writ, were rescued or violently taken from him, &c. they will award an attachment against the Rescuers. *Dyer* 212: 2 *Jon.* 39: *Salk.* 322.

But it seems to be the practice, not to grant an attachment in any case for a Rescous, unless the officer will return it: for it hath been found by experience, that officers will take on them to swear a Rescous where they will not venture to return one. 2 *Hawk. P. C.* c. 22. § 34.

A distinction was taken where an attachment is prayed for a Rescous in the first instance, and where a rule to shew cause is only asked; in this affidavits of the fact are sufficient; in the other case, the sheriff's return is requisite. *Trin.* 5 *Geo.* 2. in *B. R. Young v. Payne.*

Where on the return of a Rescue, an attachment is granted, and the party examined on interrogatories, upon answering them he shall be discharged; but if the Rescous is returned to the filazer, and process of outlawry issues, and the Rescuer is brought into Court, he shall not be discharged on affidavits. *Salk.* 586.

III. An indictment of a Rescous ought to set forth the special circumstances of the fact, with such certainty, as to enable defendant to make a proper defence. *Dyer.* 164. No defect can be aided by the verdict. 1 *Roll. Abr.* 781.

Therefore, if an indictment lay the offence on an uncertain or impossible day, as where it lays it on a future day, or lays one and the same offence at different days, or lays it on such a day which makes the indictment repugnant to itself, it is void. *Moor* 555: *Rast. Ent.* 263.

It has been adjudged, on exceptions taken to an indictment for a Rescous, that it was not necessary to allege the place where the Rescue was made, and that it should be intended that where the arrest was, there also was the Rescue. *Cro. Jac.* 345: 2 *Bulst.* 208.

An exception was taken to an indictment of Rescous, that it wanted the words *vi & armis*, or *manu forti*; but overruled, it being held by the Court, that the word *rescussit* implies it to be done by force. *Cro. Jac.* 345. The same exception taken in *Cro. Jac.* 473. over-ruled, and there held, that though it were error at Common Law, yet it is made good by the *stat.* 37 *Hen.* 8. c. 8.

It is said, that an indictment of Rescous is not within the statute of Additions, and that naming the person indicted of such a parish, without giving him any title, is sufficient. 2 *Inst.* 665: 2 *Show.* 84.

Note: on an indictment of Rescous, if it were on an arrest upon mesne process, and the party has appeared, the Court will be easily induced to quash it; so if it be on process out of an inferior court, though the party has not appeared, for no aid is given to inferior jurisdictions.

In an action for a Rescue, the plaintiff must allege in his declaration all the material circumstances; as that such a writ issued, that he

was arrested and in custody, and that he was rescued, &c. *Godb.* 125: 1 *Lutw.* 130.

In an action on the case for a Rescous on mesne process, the evidence was, the bailiff stood at the street door, and sent his follower up three pair of stairs, in disguise, with the warrant, who laid hands on the party, and told him that he arrested him; but he with the help of some women, got from the follower, and ran down stairs, and the defendant, hearing a noise, ran up, and put the party into a room, locked the door, and would not suffer the bailiff to enter. *Holt* doubted whether this was a lawful arrest, being by the bailiff's servant, and not in his presence; but said, that the plaintiff must prove his cause of action against the party; that he must prove the writ and warrant by producing sworn copies of them; he must prove the manner of the arrest, that it may appear to the Court to be legal; and, in point of damage, he must prove the loss of his debt, *viz.* that the party became insolvent, and could not be retaken. 6 *Mod.* 211.

FORM OF THE WRIT OF RESCOUS.

GEORGE the Third, &c. To the Sheriff of M. greeting: If A. B. shall make you secure, &c. then put C. D. &c. to shew, wherefore, whereas the said A. B. at, &c. certain beasts of the said C. D. had taken and distrained for rent, &c. And those, there, according to the Law and custom of our kingdom of England, would have impounded, the said C. D. the beasts aforesaid, with force and arms, rescued, and other enormities there did, to the contempt of us, and grievous damage of the said A. B. and against our peace, &c. ——— OR THUS:

PUT E. F. and G. H. to answer, &c. wherefore, whereas the said A. B. according to the duty of his office, C. D. whom by our Sheriff of the county aforesaid, by writ to him directed, we commanded to be taken at L. by virtue of our said Writ had taken, and him to our prison of, &c. there to abide, would have conveyed the said E. F. and G. H. him the said C. D. at L. aforesaid, with force of arms, rescued, and other enormities, &c.

IV. THE distinction laid down in a variety of books and cases is, that on a Rescue on mesne process the sheriff may return the Rescue, and is subject to no action; for that on a mesne process he was not obliged to raise his *posse comitatus*, nor would it be convenient so to do on the execution of every mesne process. *Cro. Eliz.* 868: 1 *March* 1: 1 *Jon.* 201: 3 *Bulst.* 198: 2 *Roll. Rep.* 389: *Noy* 40: *Moor* 852: 2 *Lev.* 144: 6 *Mod.* 141: *Lutw.* 130, 131. But the sheriff may, if he pleases, take his *posse* to arrest one on mesne process. *Noy* 40.

But if the sheriff takes a man on an execution, as on a *ca. sa.* and he is rescued from him before he can bring him to prison, though he returns the Rescue, yet this shall not excuse him; for when judgment is passed, and he and his bail do not surrender him; nor pay the condemnation-money, and then a *capias* issues, to which there can be no bail, there it is presumed that he will not be forth-coming, because neither he nor his bail have satisfied the judgment; therefore the sheriff ought to take the *posse comitatus*; consequently it cannot be a good return, that he took the body, but that it was rescued; and the party may have an action of escape against the sheriff on this return; and this is provided by the *stat. West.* 2. 13 *E.* 1. *st.* 1. *c.* 39:

which was made to prevent sheriffs from returning Rescues to the King's writs. *Cro. Jac.* 419: 1 *Roll. Ref.* 338. 440: 3 *Bulst.* 198: *Moor.* 852: Or on a *capias utlagatum* after judgment. *Cro. Jac.* 419: 1 *Roll. Ref.* 389.

In an action on the case against the sheriff for an escape on mesne process, the defendant pleaded a Rescue, which on demurrer was held a good plea, though he did not shew that the Rescue was returned. 3 *Lev.* 46.

But if one taken on mesne process be once in prison, the sheriff cannot return a Rescous, for the Law presumes that he hath a power to keep him there. 1 *Roll. Ref.* 441: 3 *Bulst.* 198: *Cro. Jac.* 419. Unless the prison is broken by the King's enemies, which shall excuse the sheriff. 4 *Co.* 84: 1 *Vent.* 239. But not if broken by rebels and traitors, for the sheriff or gaoler hath his remedy over against them. 4 *Co.* 84: *Cro. Eliz.* 815: 2 *Mod.* 28: 1 *Vent.* 239.

If a felon be attainted, and in carrying him to execution he is rescued from the sheriff, the sheriff is punishable notwithstanding the Rescue; for there is judgment given, and the sheriff should have taken sufficient power with him; therefore in that case the township is not finable. 1 *Hal. P. C.* 602: and there said that a Rescue is no excuse in felony.

It hath been adjudged, that the return of a Rescue by a sheriff must shew the year and day on which it was made, such return being in lieu of an indictment. 3 *H.* 7. 11. *pl.* 3. *Bro. Return de Brief* 97: *Fitz. Coro.* 45: *Attach.* 1.

But it hath been held, that the sheriff's return of a Rescue on a *tatitat*, without mentioning the day of the caption, was sufficient; all the clerks in court affirming the precedents to have been so. *Palm.* 332.

The sheriff's return of a Rescue, without mentioning the place where it was made, was held bad, and the party discharged. *Moor* 422. *pl.* 585.

Where the sheriff returned *virtute brevis mihi direct. feci warrant* A. & B. *ballivis meis qui virtute inde ceperunt* the defendant & in *custodia mea habuerunt quousque* such and such *rescusserunt* him *ex custodia ballivorum meorum*; this return was on motion quashed; for *per Holt*, when bailiffs have arrested the party, he is in fact in their custody, but in Law he is in custody of the sheriff; an answer either way is good, *viz.* that he was rescued out of the bailiff's custody, or that he was rescued out of the sheriff's custody; but to say that he was in the custody of the sheriff, and yet rescued out of the custody of the bailiff, is repugnant. 2 *Salk.* 586

It seems that antiently when the sheriff returned a Rescue, the party was admitted to plead to it as to an indictment; but the course of late has been not to admit any plea to it, but drive the party to his action against the sheriff, in case the return were false; hence it is now settled that the return of a Rescue is not traversable, but yet it hath been held that submission to the fine doth not conclude the party grieved from bringing his action for the false return, if it were so. *Cro. Eliz.* 781: *Dyer* 212: 2 *Jon.* 29: 1 *Vent.* 224: 2 *Vent.* 175: *Comb.* 295.

If on a *fieri facias* the sheriff returned that he had seized the goods, but that they were rescued by B. and C. &c. this is not a good return, but he shall be amerced; the party also, at whose suit the

execution issued, may charge him by *scire facias* for the value of the goods. 1 *Vent.* 21: 2 *Saund.* 343: 1 *Show.* 180.

RESCUSSOR. The party making a Rescue.

RESEISER, *Rescisore.*] The taking lands into the hands of the King, where a general livery or *ouster le maine* was formerly misused, contrary to the order of Law. *Staundf. Prærog.* 26.

RESERVATION, *Reservatio.*] A keeping aside, or providing; as when a man lets or parts with his land, but reserves or provides for himself a rent out of it for his own livelihood; sometimes it has the force of a saving or exception. *Co. Litt.* 143.

Exception is always of part of the thing granted, and of a thing in being; and a Reservation is of a thing not in being, but is newly created out of the lands or tenements demised; though Exception and Reservation have been used promiscuously. *Co. Litt.* 47. The proper place for a Reservation is next after the limitation of the estate; and Reservation of rent may be every two, three, or more years; as well as yearly, half-yearly, quarterly, &c. *Co. Litt.* 47: 8 *Repl.* 71.

It must be out of an house, or lands; and be made either by the words yielding and paying, &c. or the word covenant; which is of both lessor and lessee, therefore makes a Reservation. *Roll. Repl.* 80.

The Reservation of rent is good, although it is not reserved by apt and usual words, if the words are equivalent. *Plowd.* 120. But Reservation of a rent *secundum ratam*, is a void Reservation. 2 *Vent.* 272. See titles *Deed*; *Reddendum*; *Rent*, &c.

RESIANCE, *Resiantia.*] Residence; abode or continuance; whence comes the participle *Resiant*, that is, continually dwelling or abiding in any place. *Old Nat. Br.* 85: *Kitch.* 33.

RESIANT ROLLS, *i. e.* Rolls containing the Resiants in a tithing, &c. which are to be called over by the steward on holding courts-leet. *Comph. Court Keep.*

RESIDENCE, *Residentia.*] Is peculiarly used both in the Canon and Common Law, for the continuance of a parson or vicar on his benefice.

This was formerly regulated by *stat.* 21 *H. 8. c.* 13. and now in *England*, by 43 *Geo.* 3. *c.* 84 & 89, &c. in *Ireland* by 48 *Geo.* 3. *c.* 66. the provisions of which acts are in this respect very similar. Under these acts bishops are empowered to issue monitions to non-resident clergy, and proceed to compel them to residence by sequestration of their benefices: on disobedience, or incurring sequestration three times in three years, after three continued years, the benefice becomes void. Chaplains to his Majesty, to peers of the realm and persons holding certain offices and dignities are exempted from the penalties of non-residence. Archbishops and bishops are also exempted from such penalties.

Independent of the statutes, the bishop in his court may compel the residence of all the clergy, who have the cure or care of souls within his diocese. 3 *Burn's Eccl. Law* 281: *Gibs.* 887.—This statute is not confined to parsonages and vicarages, but extends to all arch-deaconries, deaneries, and dignities in cathedral and collegiate churches. Those who have two benefices or dignities, upon each of which Residence is required, must reside upon one or the other. But the incumbent of an augmented curacy cannot be prosecuted under the statute for the penalties of Non-residence. 4 *Term Rep.* 665.

Bishops are liable to ecclesiastical censures for Non-Residence on

their Bishoprick; and the King may issue a mandatory writ to enforce their attendance, and compel them to it, by seizing their temporalities; as King *Henry III.* did by the bishop of *Hereford*. 2 *Inst.* 625.

One of the great duties incumbent on clergymen, is that they be resident on their livings: And on the first erecting parochial churches, every clergyman was obliged to reside on his benefice, for reading of prayers, preaching, &c. by the laws and canons of the church; and by statute, the parson ought to abide on his rectory in the parsonage-house; for the statute is intended not only for serving the cure, and for hospitality, but to maintain the house in repair, and prevent dilapidations: though lawful imprisonment, sickness, &c. being things of necessity, are good cause of excuse for absence, and excepted out of the act by construction of Law: And it is the same where a person is employed in some important business for the church or King; or is entertained in the King's service. 6 *Rept.* 21: *Cro. Eliz.* 580: *Gibbs. Cod.* 887.

In an information on the statute 21 *H.* 8. it was adjudged, that the parson is to live in the parsonage-house, and not in any other, though in the same parish. Under *stat.* 13 *Eliz. cap.* 20. leases made by parsons are declared void, where the parson is absent above eighty days in any one year, &c. On this act, the defendant pleaded to an agreement for tithes, that the parson was absent from his parsonage by the space of eighty days in one year; and the jury found that he dwelt in another town adjoining, and came constantly to his parish church four days in every week, and there read divine service; and it was held, that this was not such an absence as is intended by the statute to avoid any agreement or lease made by the parson. 1 *Bulst.* 112. See title *Lease II.*

A parson allowed to have two benefices, may demise or lease one of them (on which he is non-resident) to his curate only; but if the curate leases over, such lease shall last no longer than during the curate's residence, without absence above forty days in any one year. 1 *Leon.* 100. See *Cro. Eliz.* 123. Some words in the act 13 *Eliz. c.* 20. as to leases by parsons not resident, repealed. See *stat.* 14 *Eliz. c.* 11.

An incumbent presented by the University to a recusant's living, shall lose it by sixty days' absence in a year. 1 *W. & M. c.* 26. § 6.

RESIDUARY LEGATEE, Is he to whom the *residuum* of the estate is left by will. See titles *Executor; Legacy.*

RESIGNATION, Resignatio.] The yielding up a benefice into the hands of the ordinary, called, by the canonists, Renunciation; and though it is all one in nature with the word Surrender, yet it is, by use, restrained to yielding up a spiritual living to the bishop; as Surrender is the giving up of temporal land into the hands of the lord. And a Resignation may now be made into the hands of the King as well as the diocesan, because he has *supremam auctoritatem ecclesiasticam*, as the Pope had in antient times; though it has been adjudged that a Resignation ought to be made only to the bishop of the diocese, and not to the King; because the King is not bound to give notice of the Resignation to the patron, as the ordinary is; nor can the King make a collation himself, without presenting to the bishop. *Plowd.* 498: *Roll. Abr.* 358.

Every parson who resigns a benefice, must make the Resignation to his superior; as an incumbent to the bishop, a bishop to the arch-

bishop, and an archbishop to the King, as supreme ordinary: A donative is to be resigned to the patron, not the ordinary; for in that case the clerk received his living immediately from the patron. 1 *Repl.* 137.

A common benefice is to be resigned to the ordinary, by whose admission and institution the clerk first came into the church: And the Resignation must be made to that ordinary who hath power of institution; in whose discretion it is either to accept or refuse the Resignation; as the Law hath declared him the proper person to whom it ought to be made, it hath likewise empowered him to judge thereof. *Cro. Jac.* 64. 198.

The instrument of Resignation is to be directed to the bishop; and when the bishop hath accepted of it, the Resignation is good, to make void the church, and not before; unless it be where there is no cure, when it is good without the acceptance of the bishop. A Resignation may be made before a public notary, but without the bishop's acceptance, it doth not make the church void: the notary can only attest the Resignation, in order to its being presented, &c. *Cro. Jac.* 64. 198.

Before acceptance of the Resignation by the bishop, no presentation can be had to the church; but, as soon as the acceptance is made, the patron may present to the benefice resigned: And when the clerk is instituted, the church is full against all men in case of a common person; though, before induction, such incumbent may make the church void again by Resignation. *Count. Pars. Comp.* 106.

It seems to be clear, that the bishop may refuse to accept a Resignation upon a sufficient cause for his refusal: But whether he can, merely at his will and pleasure, refuse to accept a Resignation without any cause, and who shall finally judge of the sufficiency of the cause, and by what mode he may be compelled to accept, are questions undecided. In the case of the *Bishop of London v. Ffytche*, the Court of *K. B.* held, that the Ordinary could not refuse to admit a clerk to a rectory to which he was presented, because he had given a general bond to resign upon the request of his patron. 1 *East's Repl.* 487 But this judgment was reversed in the House of Lords, and the Judges in general declined in that case to answer whether a bishop was compellable to accept a Resignation: one thought he was compellable by *Mandamus*, if he did not shew sufficient cause; and another observed, that, if he could not be compelled, he might prevent any incumbent from accepting an *Irish* bishoprick; as no one can accept such bishoprick till he has resigned all his benefices in *England*. But Lord *Thurlow* seemed to be of opinion, that he could not be compelled, particularly by *Mandamus*, from which there is no appeal on writ of error. 1 *Comm. c.* 11. *f.* 393, in *n.* See title *Simony*.

A parsonage is not to be granted over by the incumbent, but it may be resigned; and Resignations are to be absolute, and not conditional; for it is against the nature of a Resignation to be conditional, being a judicial act. 3 *Nels. Abr.* 157.

If any incumbent corruptly resign his benefice, or take any reward for resigning the same, he shall forfeit double the value of the sum, &c. given, and the party giving it, be incapable to hold the living. *Stat. 31 Eliz. c.* 6. § 8. But a man may bind himself by bond to resign, and it is not unlawful, but may be on good and valuable reasons; as, where he is obliged to resign if he takes a second benefice, or if

he be non-resident by the space of so many months, or to resign on request, if the patron shall present his son or kinsman, when he shall be of age capable to take the living, &c. *Cro. Jac.* 249, 274. Though bonds for Resignation of benefices have no encouragement in Chancery; for on such bonds, generally, the incumbent is relieved, and not obliged to resign. 1 *Rol. Abr.* 443. On debt upon a bond to resign a benefice, the Court would not let the defendant's counsel argue the validity of the bond, these bonds having been so often established even in a Court of Equity. 1 *Strange* 227. But such a bond will not be allowed, where money has been paid on it. *Ibid.* 534.

The Court of *K. B.* determined that a bond given by a schoolmaster of an antient public school; who had a freehold in his office, to resign at the request of his patron, was good at Law; but Equity will restrain any improper use of it by the patron. 1 *East's Rep. K. B.* 391. On error brought in this case in the Exchequer Chamber, that Court thought it did not appear that it was a freehold office, and therefore affirmed the judgment without giving any opinion on the principal point. 3 *Bos. & Pul.* 231. See further, title *Simony*.

A parson's refusal to pay his tenth, it is said, is a Resignation, for which he may be deprived. *Owen* 5. And where Resignation is actually made *de ecclesia*, it extends to all the lands and possessions of the church. *Cro. Jac.* 63.

The usual words of a Resignation are *renuncio, cedo, dimitto*, and *resigno*; and the word *resigno* is not a proper term alone. 2 *Rol.* 350.

As to Resignation of fees in the *Scotch Law*. See title *Procuratory of Resignation*.

As to Resignation of temporal offices.—Declaring, at an assembly of the corporation, that he would hold the place of alderman no longer, is a good Resignation, especially since the corporation accepted it, and chose another in his place; but, till such election, he had power to waive his Resignation, but not afterwards, 2 *Salk.* 433.

A burgess of a corporation came to the mayor, and desired the mayor to remove and dismiss him from the place of burgess. On return of this, a *Mandamus* was denied to restore him; for having resigned voluntarily, he is estopped to say, that the mayor had no power to remove him; and the case being sent to *Hale*, Ch. B. he agreed, and said, that a corporation, as such, have power to take such Resignation. *Sid.* 14.

But giving consent to be removed, does not amount to a Resignation. A man may resign an office by parol. *Holt's Rep.* 450.

Resignation by a common-council-man need not be by deed. *Lutw.* 405.

Where an alderman is a justice of peace for life, by force of the patent of the King, who created the corporation, he cannot resign his office of justice of peace; because he cannot resign it but to a superior; *per Coke*, Ch. J.: *Rol. Rep.* 135. *pl.* 19.

So, if a man can have no title to the profits of an office, without the admission or confirmation of a superior, there the Resignation of that office must be to him. 3 *Nels. Abr.* 158. See titles *Corporation*; *Mandamus*; *Quo Warranto*.

RESORT, *Resortum*; The authority or jurisdiction of a Court. *Spelm.*

Dernier Resort, the last refuge.—The House of Lords is the *Dernier Resort* in cases of appeal.

RESPECTU COMPUTI VICECOMITIS HABENDO, a writ for respiting a sheriff's account, directed to the treasurer and barons of the *Exchequer Reg. Orig.* 139. See title *Sheriff*.

RESPITE, *Respectus*.] A delay, forbearance, or continuation of time. *Glanvil, lib. 12. c. 9.* See this Dict. title *Execution of Criminals*.

RESPITE OF HOMAGE, *Respectus Homagii*.] The forbearance or delay of Homage, which ought to be performed by tenants holding by Homage, &c. It was most frequently in use for such as held by *knights-service* and *in capite*, who formerly paid into the *Exchequer*, every fifth term, some small sum of money to be *respited* their homage: But this charge being incident to, and arising from *knights-service*, it is taken away by *stat. 12 Car. 2. c. 24.* See titles *Tenures; Homage*.

RESPITE OF JURY; See titles *Jury; Nisi Prius; Trial*.

RESPONDEAS, or **RESPONDEAT OUSTER**. *To answer over* in an action, to the merits of the cause, &c. If a demurrer is joined on a plea to the jurisdiction, person, or writ, &c. and it be adjudged against the defendant, judgment is given that he shall answer over. See titles *Judgment; Demurrer*.

RESPONDEAT SUPERIOR. If sheriffs of *London* are insufficient, the Mayor and Commonalty must answer for them: And *jur insufficiency del bailiff d'un liberty*, *respondeat dominus libertatis*. *4 Inst. 114; Stat. 44 Edw. 3. cap. 13.*

If a coroner of a county is insufficient, the county as his *Superior* shall answer for him. *Wood's Inst. 83.*

A gaoler constitutes another under him, and he permits an escape, if he be not sufficient, *Respondeat Superior*; and superior officers must answer for their deputies in civil actions, if they are insufficient to answer damages. *Doct. & Stud. c. 24.* See titles *Deputy; Officer*.

RESPONDE-BOOK in *Exchequer*: A book kept by the Directors of Chancery, in *Scotland*, in which are kept the accounts of all non-entry and relief duties; payable by heirs, who take precepts from Chancery. *Bell's Scotch Dict.*

RESPONDENTIA; See *Bottomry; Insurance IV.*

RESPONSALIS, *Qui responsum deferat*.] He who appears and answers for another in court at a day assigned. *Glan. lib. 12. c. 1.* *Fleta* makes a difference between *responsalem*, *attornatum*, and *esso-niatorem*; he says that *responsalis* was for the tenant, not only to excuse his absence, but to signify what trial he meant to undergo, the combat or the country. *Fleta, lib. 6. c. 21.*

This word is made use of in the Canon Law for a proctor.

RESTITUTION, *Restitutio*.] The restoring any thing unjustly taken from another: It signifies also the putting him in possession of lands or tenements, who had been unlawfully disseised of them. *Cromp. Just. 144.* And Restitution is a writ, which lies where judgment is reversed, to restore and make good to the defendant what he hath lost: The Court which reverses the judgment, gives, on reversal, a judgment *for Restitution*; whereon a *scire facias quare restitutionem habere non debet*, reciting the reversal of the judgment, and the writ of execution, &c. must issue forth. But the Law doth often restore the possession to one without a writ of Restitution, *i. e.* by writ of *habere facias possessionem*, &c. in the common proceeding of justice on a trial at Law. *2 Lill. Abr. 472, 3.* See title *Execution*.

There is a Restitution of the possession of lands in cases of forcible entry; a Restitution of lands to an heir, on his ancestor's being attainted of treason or felony; and Restitution of stolen goods, &c.

A writ of Restitution is not properly to be granted but where the party cannot be restored by the ordinary course of Law; and the nature of it is, to restore the party to the possession of a freehold, or other matter of profit, from which he is illegally removed; and it extends to Restitution on *Mandamus* to any public office. 2 *Lill.* 472, 473.

Where a judgment for land is reversed in *B. R.* by writ of error, the Court may grant a writ of Restitution to the sheriff to put the party in possession of the lands recovered from him by the erroneous judgment; though there ought to be no Restitution granted of the possession of lands, where it cannot be grounded on some matter of record appearing to the Court. *Hil.* 22 *Car.* And persons who are to restore, are to be parties to the record; or they must be made so by special *scire facias*. *Cro. Car.* 328: 2 *Salk.* 587.

If a lease is taken in execution on a *Fi. fa.* and sold by the sheriff, and afterwards the judgment is reversed; the Restitution must be of the money for which it was sold, not the term. *Cro. Jac.* 246: *Moor* 788. But where a sheriff extended goods and lands on an *elegit*, and returned that he took a lease for years, which he sold and delivered to the plaintiff as *bona & catalla* of the defendant for the debt, and afterwards the judgment was reversed for error; it was adjudged, that the party shall be restored to the lease, because the *elegit* gave the sheriff no authority to sell the term, therefore a writ of Restitution was awarded. *Yelv.* 179. And there has been, in this case, a distinction made between compulsory and voluntary acts done in execution of justice; where the sheriff is commanded by the writ to sell the goods, and where he is not, when the goods are to be restored, &c. 8 *Rep.* 96.

If a plaintiff hath execution, and the money is levied and paid, and afterwards the judgment is reversed, there the party shall have Restitution without a *scire facias*, for it appears on the record what the party hath lost and paid; but if the money was only levied, and not paid, then there must be a *scire facias* suggesting the sum levied, &c. And where the judgment is set aside after execution for an irregularity, there needs no *scire facias* for Restitution; but an attachment of contempt, if, on the rule for Restitution, the money is not restored. 2 *Salk.* 588.

In a *scire facias quare restitutionem*, &c. the defendant pleaded payment of the money mentioned in the *scire facias*, and it was held to be no plea, *Cro. Car.* 328. But now payment is a good plea to a *scire facias* by the *stat. 4 & 5 Ann. c. 16. § 12*: 2 *Lill. Abr.* 479.

Upon a writ of *Vi laica removenda* a parson was put out of possession; and on a suggestion thereof, and affidavit made, Restitution was ordered. *Cro. Eliz.* 465.

The justice of peace, before whom an indictment for forcible entry is found, must give the party Restitution of his lands, &c. who was put out of possession by force. *Stat. H. 6. c. 9*.—But where one is indicted for a forcible entry, and the party indicted traverses the indictment, there cannot be Restitution before trial and a verdict, and judgment given for the party, though the indictment be erroneous; it being too late to move to quash the indictment after the traverse,

which puts the matter on trial. 2 *Lill.* 473, 474. See *Forcible Entry* II.

A person being attainted of treason, &c. he or his heirs may be restored to his lands, &c. by the King's charter of pardon; and the heir, by petition of right, may be restored if the ancestor is executed: But Restitution of blood must be by act of Parliament; and Restitutions by Parliament are some of blood only, some of blood, honour, inheritance, &c. The King may restore the party, or his heirs, to his lands, and the blood, as to all issue begotten after the attainer. 3 *Inst.* 240: *Co. Litt.* 8. 391. See titles *Attainder*; *Forfeiture*, &c.

On a conviction of larceny, the prosecutor shall have Restitution of his goods, by virtue of *stat.* 21 *H. 8. c.* 11: for, by the Common Law, there was no Restitution of goods upon an indictment, it being considered as at the suit of the King only; and therefore the party was enforced to bring an appeal of robbery, in order to have his goods again. 3 *Inst.* 242. But it being considered, that the party prosecuting the offender by indictment deserves, to the full, as much encouragement as he who prosecutes by appeal; this statute was made, which enacts, that if any person be convicted of larceny, by the evidence of the party robbed, he shall have full Restitution of his money, goods, and chattels, or the value of them, out of the offender's goods, if he has any, by a writ to be granted by the justices. And the construction of this act having been in a great measure conformable to the Law of Appeals, it has therefore in practice superseded the use of appeals of larceny. For instance: As formerly upon appeals, so now upon indictments of larceny, this writ of Restitution shall reach the goods so stolen, notwithstanding the property of them is endeavoured to be altered by sale in market-overt. 1 *Hal. P. C.* 543. And, though this may seem somewhat hard upon the buyer, yet the rule of law is, that *spoliatus debet, ante omnia, restitui*; especially when he has used all the diligence in his power to convict the felon. And, since the case is reduced to this hard necessity, that either the owner or the buyer must suffer, the law prefers the right of the owner, who has done a meritorious act, by pursuing a felon to condign punishment to the right of the buyer, whose merit is only negative, that he has been guilty of no unfair transaction. See 2 *Inst.* 714: 3 *Inst.* 242: 5 *Reph.* 109. And it is now usual for the court, upon the conviction of a felon, to order (without any writ, no instance of the suing out of which has occurred for three hundred years) immediate Restitution of such goods, as are brought into court, to be made to the several prosecutors. Or, else, secondly, without such writ of Restitution, the party may peaceably retake his goods, wherever he happens to find them, unless a new property be fairly acquired therein. Or, lastly, if the felon be convicted and pardoned, or be allowed his clergy, the party robbed may bring his action of trover against him for his goods; and recover a satisfaction in damages. But such action lies not before prosecution; for so felonies would be made up and healed: 1 *Hal. P. C.* 546. And also recaption is unlawful, if it be done with intention to smother or compound the larceny; it then becoming the heinous offence of *Theftobote*. See 4 *Comm. c.* 27. *p.* 363.

If goods stolen are not waived by flight, or seized for the King, the party robbed may take his goods again without prosecuting the felon: but after they are seized for the King, they may not be restored without appeal or indictment. *Kel.* 48: 2 *Hawk. P. C. c.* 23. § 49.

A servant took gold from his master, and changed it into silver; the master shall have Restitution of the silver by this statute. *Cro. Eliz.* 661. *pl.* 9.

A. stole cattle and sold them at *Coventry*, in an open market, and immediately he was apprehended by the sheriff of *Coventry*, and they seized the money; and afterwards the thief was arraigned and hanged, at the suit of the owner of the cattle: And, by the Court, the party shall have Restitution of the money, notwithstanding the words of the *stat.* 21 *H. 8. c.* 11. the goods stolen, &c. *Noy* 128.

A bank note of 50*l.* was stolen from *Golightly*, by one *Ferguson*. He was apprehended, and several articles of silver plate, a bank note of 20*l.*, and ten guineas in gold, which were found upon him, were produced at the trial, and placed in the custody of *Reynolds*, clerk of the arraigns. *Golightly* gave evidence against *Ferguson* at the Old Bailey, and he was convicted of stealing the 50*l.* note. The owner demanded Restitution from *Reynolds* of the goods found upon *Ferguson*; but, as they were not the identical goods which *Golightly* had lost, *Reynolds* refused to restore them. But on trover being brought in *B. R.* they were ordered to be restored, they being the produce of the 50*l.* bank note. *Lofft.* 90.

The owner of goods stolen, who has prosecuted the thief to conviction, cannot recover the value of his goods from a person who has purchased them, and sold them again, even with notice of the theft, before conviction. 2 *Term Rep.* 750. But the plaintiff has a right to the Restitution of the goods in *specie*, and perhaps would be entitled to recover damages in trover against any person who is fixed with the goods after conviction, and refuses to deliver them; for then the goods are converted to the prejudice of the owner. *Per Kenyon, C. J.*

If the owner of goods loses them by a fraud, and not by a felony, and afterwards convicts the offender, he is not entitled to Restitution; or to retain them, against a person (as a pawnbroker) who has fairly acquired a new right of property in them. 5 *Term Rep.* 175.

See further, this Dictionary, title *Market*; and the *Stat.* 1 *Jac.* 1. *c.* 21. there noticed, by which the sale of goods, wrongfully taken, to a pawnbroker within *London* or two miles thereof shall not alter the property. See also *stat.* 36 *Geo.* 3. *c.* 87. §. 10. and this Dictionary, title *Pawnbrokers*, as to goods illegally pawned. As to stolen horses, see this Dictionary, title *Horses*; and *stat.* 31 *Eliz.* *c.* 12. whereby the owner may, within six months, on paying the buyer what he actually paid, recover his horse without prosecution.

RE-RESTITUTION, Takes place when there hath been a writ of Restitution before granted: And Restitution is generally matter of duty; but Re-restitution is matter of grace. *Raym.* 85.

A writ of Re-restitution may be granted on motion, if the Court see cause to grant it. And on quashing an indictment of forcible entry, the Court of *B. R.* may grant a writ of Re-restitution, &c. 2 *Lill. Abr.* 474. See title *Forcible Entry* II.

RESTITUTIONE EXTRACTI AB ECCLESIA, A writ to restore a man to the church, which he had recovered for his sanctuary, being suspected of felony. *Reg. Orig.* 69.

RESTITUTIONE TEMPORALIUM, A writ directed to the sheriff, to restore the *Temporalities* of a bishoprick to the bishop elected and confirmed. *F. N. B.* 169: 1 *Roll. Abr.* 880.

RESTITUTION OF MINORS, In the *Scotch Law*, a restoring them to

rights lost by deeds executed during their minority. See *Quadrien-nium Utile*.

RESULTING USE. Whenever the use limited by a deed expires, or cannot vest, *it returns back to him who raised it*, after such expiration, or during such impossibility, and is styled a Resulting Use. As, if a man makes a feoffment to the Use of his *intended* wife for life, with remainder to the use of the first-born son in tail: Here, *till he marries, the Use results back to himself*; after marriage it is executed in the wife for life; and if she dies without issue, the whole results back to him in fee. *Bacon of Uses* 350: 1 *Repl.* 120. See title *Uses*.

RESUMMONS, Resummonitio.] A second Summons or calling a man to answer an action, where the first Summons is defeated by any occasion; and when, by death, &c. of the judges, they do not come on the day to which they were continued, for trial of causes: such causes may be revived or recontinued by Resummons. There is also a writ of Resummons, which issues after *parol demurrer*. See titles *Parol Demurrer*; *Re-attachment*.

RESUMPTION, Resumptio.] Is particularly used for taking again into the King's hands such lands or tenements, &c. as on false suggestion he had granted by letters patent to any man. *Broke* 298. It is said, that the King cannot grant a prerogative of power so but that he may resume it; otherwise it is of a grant of an interest. *Skinner's Repl.* 236. Many acts have been heretofore passed for resuming improvident grants of the crown. See title *Grant of the King*.

RETFAINER, from the Latin Retinere.] Signifies, in a legal sense, a servant, but *not menial or familiar*, that is, not continually dwelling in the house of his master, but only *wearing his livery*, and attending sometimes upon special occasions. This livery was wont to consist of hats, (or hoods,) badges, or other suits of one garment by the year; and was many times given by great men, on design of maintenance and quarrels; and was therefore justly forbidden by several statutes; as by *stat. 1 R. 2. c. 7.* on pain of imprisonment and forfeiture to the King; and again, by *stat. 16 R. 2. c. 4:* 20 *R. 2. c. 1:* 1 *H. 4. c. 7.* by which the offender should make ransom at the King's will; and any knight or esquire thereby duly attainted should lose his livery, and forfeit his fee for ever, &c. which statutes were further confirmed and explained by *stats. 2 H. 4. c. 21:* 7 *H. 4. c. 3:* 8 *H. 6. c. 4.* Yet this offence was so deeply rooted, that *Edward* the Fourth was necessitated to confirm the former statutes, and further to extend their meaning; as appears by *stat. 8 Edw. 4. c. 2.* adding a special penalty of five pounds on every man who gave such *livery*, and as much on every one so *retained*, either by writing, oath, or promise, for every month.

These were by the feudists, called *Affidati, sic enim dicuntur qui in alicujus fidem & tutelam recepti sunt*. And as our Retainers were thus forbidden, so were those *affidats* in other countries. But most of the above-mentioned statutes were repealed by *stat. 3 Car. 1. c. 1.* *Cowell*. And the provisions of these obsolete and expired laws, are rendered useless by the alteration of manners. See further, title *Maintenance*.

RETAINER OF DEBTS, By an executor or administrator. See title *Executor* V. 6.

RETAINING FEE, Merces retinens.] The first fee given to any ser-

jeant or counsellor at law; whereby to make him sure that he shall not be on the contrary part.

RETALIATION; See *Lex Talionis*.

RETENEMENTUM, is a word used for detaining, withholding or keeping back. And *sine ullo retenemento* was an usual expression in old deeds and conveyances of lands. *Cowell*.

RETENTION, the right of withholding a debt, or retaining property until a debt due to the person claiming the right of Retention, shall be paid. See *Lien*.

RETINENTIA, a Retinue, or persons retained to a prince or nobleman. *Pat. 14 R. 2.*

RETORNO HABENDO; See *Retorno habendo*; *Reflevin*.

RETOUR, in *Scotch Law*; this name is given to an extract from the chancery of the service of an heir to his ancestor. The brief of inquest, after the jury have pronounced their sentence is retourable to the chancery whence it issued; and it is the duty of the judge to whom it is directed, to return it; nor is the service complete till this is done. The extract or copy from chancery is what is termed the Retour. *Bell's Scotch Dict.*

RETOURED DUTY, is the valuation, both new and old, of lands, expressed in the retour to the chancery, when any is returned, or served heir. *Scotch Dict.*

RETRACTUS AQUÆ, The ebb or return of a tide. *Plac. 30 Ed. 1.*

RETRACTUS FEUDALIS, In *Scotch Law* a power antiently claimed by the superior of an estate to pay off a debt adjudged, and to take a conveyance of the estate. *Bell's Scotch Dict.*

RETRAXIT, Is when a plaintiff cometh in person in court where his action is brought, and saith he will not proceed in it; and this is a bar to that action for ever. It is so called, because it was the emphatical word in the Latin entry. See *Sellon's Pract.* and this Dictionary, titles *Nonsuit*; *Nolle Prosequi*.

A *Retraxit* must be always in person; if it is by attorney, it is error. 8 *Rep.* 58: 3 *Salk.* 245.

A *Retraxit* is a bar to any action of equal nature, brought for the same cause or duty: but a nonsuit is not. 1 *Inst.* 208: See *Wils.* 90.

If a plaintiff says, he will not appear, this is not a *Retraxit*, but a nonsuit: But if the plaintiff says he will not sue, it is a *Retraxit*. 2 *Danv. Abr.* 471. And *Retraxit* is always on the part of the plaintiff or demandant; and it cannot be before a declaration, for before the declaration it is only a nonsuit. 3 *Leon.* 47: 2 *Lill. Abr.* 476.

If a plaintiff enter a *Retraxit* against one joint-trespasser, it is a release to the other. *Cro. Eliz.* 762. *Sed. qu?* For if a *Retraxit* be entered as to one appellee in appeal of murder, the suit may be continued against the rest; because the appellant is to have a several execution against every one of them. *H. P. C.* 190. In a prohibition by three, a *Retraxit* of one shall not bar the other two plaintiffs. *Moor* 469: *Nels. Abr.* 165. A *Retraxit* in its operation is mostly similar to a *Nolle prosequi*, entered to the whole cause of action. See that title.

RETTE, *Fr.*] A charge or accusation. *Stat. West.* 1. c. 2. *Co. Lit.* 173, b. and n.

RETURN, *Returna*, or *Retorna*, from the *Fr. retour*, i. e. *redditio. recursus*.] Hath many applications in Law; but is most commonly

used for the return of writs, which is the certificate of the sheriff made to the court, of what he hath done touching the execution of any writ directed to him; and where a writ is executed, or the defendant cannot be found, &c. then this matter is endorsed on the back of the writ by the officer, and delivered into the court whence the writ issued, at the day of the return thereof in order to be filed. *Stat. Westm. 2. 13 E. 1. c. 39: 2 Lill. Abr. 476.* See titles *Sheriff; Writ.*

The name of the sheriff must always be to Return of writs; otherwise it doth not appear how they came into court: if a writ be returned by a person to whom it is not directed, the Return is not good, it being the same as if there was no Return on it. And after a Return is filed, it cannot be amended; but before, it may. *Cro. Eliz. 310.*

If the sheriff doth not make a Return of a writ, the Court will amerce him: So, if he makes an insufficient Return; and if he makes a false Return, the party grieved may have an action on the case against him. *Wood's Inst. 71.*

If a sheriff return a vouchee summoned, where in truth he is dead, and there is no such person; or in a *præcipe quod reddat* that the tenant is dead, &c. there may be an averment against such Returns, by the *stat. 14 Ed. 3. c. 18: Jenk. Cent. 121, 122.*

Some returns are a kind of declaration of an accusation; as the Return of a rescous, and the like; and these must be certain and perfect, or they will be ill. *11 Rep. 40: Plow. 63. 117: Keilw. 65.*

Writs to do things in franchises, are directed to, and returned by the sheriff, to whom bailiffs make their returns: And an action will lie against a sheriff who takes the return of one who is no bailiff, and against him who makes it; and likewise against the bailiff of a franchise, for negligence in execution, &c. *7 Ed. 4. 14: 12 Ed. 4. 15: Moor c. 606.*

There is also a Return of juries by sheriffs; and Returns of commissions by commissioners, &c. See the several appropriate titles.

RETURN-DAYS, certain days in term, for the return of writs, or days in bank. See *Term.*

RETURNO-HABENDO. A writ which lies where cattle are distrained and replevied, and the person who took the distress justifies the taking, and proves it lawful; on which the cattle are to be returned to him.

This writ also lieth when the plaint in replevin is removed by *recordari*, into the King's Bench or Common Pleas, and he whose cattle are distrained makes default, and doth not prosecute his suit. *F. N. B. 74.* See title *Replevin.*

RETURNS OF MEMBERS TO PARLIAMENT; See *Parliament.*

RETURNUM AVERIORUM, A judicial writ, the same with *Returmo habendo.* *Reg. Judic. 4.*

RETURNUM IRREPLEGIABILE, A writ judicial, directed to the sheriff for the final restitution or return of cattle to the owner when unjustly taken or distrained, and so found by verdict; and it is granted after a nonsuit in a second deliverance. *Reg. Judic. 27.* See title *Replevin.*

REVE, or Gereve, from the Saxon word *Grafa*, *Præfectus*, *Lambard's* explication of Saxon words, verb. *Præfectus.*] The bailiff of a franchise or manor, especially in the western part of England: Hence Shire-reve for Sheriff. See *Kitchin 43.*

REVELACH, Rebellion, from *revellare*, to rebel. *Gale. Domesday*, title *Cestrescire*.

REVELAND, *Terra Regis*. *Hæc terra fuit tempore Edwardi Regis Tainland, sed postea conversa est in Reveland. Et item dicunt legati Regis quod ipsa terra & census qui inde exit, furtim aufertur à Rege. Domesd. Herefordsc.*

The land here said to have been *Thaneland*, *T. E. R.* and after converted into *Reveland*, seems to have been such land as having reverted to the King after the death of his *Thane*, who had it for life, was not since granted out to any by the King, but rested in charge on the account of the *reve* or bailiff of the manor; who (as it seemeth) being in this lordship of *Hereford*, like the *reve* in *Chaucer*, a false brother, concealed the land from the auditor, and kept the profit of it; till the surveyors, who are here called *Legati Regis*, discovered this falsehood, and presented to the King that *furtim aufertur à Rege*.

This passage from *Domesday-book* is imperfectly quoted by Sir *Edward Coke*, who from these words draws a false inference, that land holden by knight-service was called *Thainland*, and land holden by socage was called *Reveland*. *Cowell*. See *Spletman of Feuds*, c. 24: 1 *Inst.* 86, a and n.

Dalrymple attempts to establish a distinction between *Bockland*, or *Thaneland*, and *Reveland*, also called *Folkland*; and to shew that the former was feudal, and the latter allodial. *Dalrymple. Feud. prop.* 9. See titles *Tenures*; *Coppyhold*; *Bockland*; *Folkland*.

REVELS, Sports of dancing, masking, &c. formerly used in princes' courts, the inns of court, and noblemen's houses; commonly performed by night; there was an officer to order and supervise them, who was entitled Master of the Revels. *Cowell*.

REVENUE, *Fr.*] Properly the yearly rent which accrues to any man from his lands and possession; and is generally used for the revenues or profits of the Crown.

Whoever chooses to be informed of the fiscal prerogatives of the King, or such as regard his revenue; which the *British* constitution hath vested in the royal person, in order to support his dignity, and maintain his power, will find them very curiously and learnedly treated of by *Blackstone*, in the 8th chapter of the first volume of his *Commentaries*. And see this Dict. titles *King*; *Taxes*.

REVERSAL, Of judgment; Is the making it void for error; and when, on the return of a writ of error, it appears that the judgment is erroneous, then the court give judgment *Quod judicium revocetur, annulletur & penitus pro nullo habeatur*. 2 *Lill. Abr.* 481.

The eldest Judge of the court, or, in his absence, the next in seniority, always pronounces the reversal of an erroneous judgment openly in court, on the prayer of the party; formerly it was the course to pronounce it in *French*, to this effect, *Pur les errors avandit, & auter errors manifest in le record, soit le judgment reverse*, &c. *Trin.* 22 *Car. B. R.* The Judge now only says, *Judgment affirmed*, or *Judgment reversed*, as the case happens.

Reversal of a judgment may be pronounced conditionally, *i. e.* That the judgment is reversed if the defendant in the writ of Error doth not shew good cause to the contrary at an appointed time; and this is called a *revocetur nisi*; and if no cause be then shewn, it stands reversed without further motion. 2 *Lill.* 482.

By the statute of Limitations, *stat.* 21 *Jac.* 1. c. 16. § 4. where judgment is given for a plaintiff, and reversed by writ of Error; or if judg-

ment for a plaintiff be arrested, or if a defendant in an action by original be outlawed, and the outlawry reversed, the plaintiff may commence a new action within twelve months after such Reversal, or arrest of judgment, or Reversal of outlawry: though it be beyond the time of limitation directed by the statutes. See title *Limitation of Actions*.

See further, this Dictionary, titles *Attainder*; *Error* VI: *Judgment* II.

REVERSER. *Scotch Law*: A Reversioner. See title *Reversion*.

REVERSION, *Reversio*, from *Revertor*. A returning again. 1 *Inst.* 142.

A Reversion hath two significations; the one is an estate left, which continues during a particular estate in being; and the other is the returning of the land after the particular estate is ended: It is said to be *an interest in the land, when the possession shall fall*, and so it is commonly taken; or it is when the estate, which was parted with for a time, ceaseth, and is determined in the persons of the alienees or grantees, &c. and returns to the grantor or donor, or their heirs, from whence derived. *Plowd.* 160; 1 *Inst.* 142.

But the usual definition of a Reversion is, that it is *the residue of an estate left in the grantor after a particular estate granted away*, continuing in him who granted the particular estate; and where the particular estate is derived out of his estate. Also a Reversion takes place after a Remainder, where a person makes a disposition of a less estate, than that whereof he was seised at the time of making thereof. 1 *Inst.* 22, 142: *Wood's Inst.* 151.

The difference between a Reversion and a remainder is, that a remainder is general, and may be to any man, except to him who granteth the land, for term of life, or otherwise; and a Reversion is to himself from whom the conveyances of the land proceeded, and is commonly perpetual, &c. Remainder is an estate, appointed over at the same time: But the Reversion is not always at the same time appointed over. See title *Remainder*.

Blackstone, with his usual accuracy and perspicuity, shortly defines a *Reversion* thus: "The residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him." *Coke* describes a reversion to be the returning of land to the grantor, or his heirs, after the grant is over: As, if there be a gift in tail, the Reversion of the fee is, without any special reservation vested in the donor by act of Law; and so also the Reversion, after an estate for life, years, or at will, continues in the lessor: For the fee-simple of all lands must abide somewhere; and if he, who was before possessed of the whole, carves out of it any smaller estate, and grants it away, whatever is not so granted, remains in him. A Reversion is never therefore created by deed or writing, but arises from construction of law; a remainder can never be limited, unless by either deed or devise. But both are equally transferrable, when actually vested, being both estates *in prasenti*, though taking effect *in futuro*. 2 *Comm. c.* 11. cites 1 *Inst.* 22. 142.

The doctrine of Reversions is plainly derived from the feudal constitution: For, when a feud was granted to a man for life, or to him and his issue male, rendering either rent, or other services; then, on his death, or the failure of issue male, the feud was determined and resulted back to the lord or proprietor, to be again disposed of

at his pleasure: and hence the usual incidents to Reversions are said to be fealty and rent. When no rent is reserved on the particular estate, fealty however results of course, as an incident quite inseparable, and may be demanded as a badge of tenure or acknowledgment of superiority; being frequently the only evidence that the lands are holden at all. Where rent is reserved, it is also incident, though not inseparably so, to the Reversion. 1 *Inst.* 143. The rent may be granted away, reserving the Reversion; and the Reversion may be granted away, reserving the rent; by special word: but by a general grant of the Reversion, the rent will pass with it, as incident thereunto; though by the grant of the rent generally, the Reversion will not pass. The incident passes by the grant of the principal, but not *è converso*. 1 *Inst.* 151, 2.

These incidental rights of the reversioner, and the respective modes of descent, in which remainders very frequently differ from Reversions, have occasioned the law to be careful in distinguishing the one from the other, however inaccurately the parties themselves may describe them: For if one, seised of a paternal estate in fee, makes a lease for life, with remainder to himself and his heirs, this is properly a mere Reversion, to which rent and fealty shall be incident; and which shall only descend to the heirs of his father's blood, and not to his heirs general, as a remainder limited to him by a third person would have done: For it is the old estate, which was originally in him, and never yet was out of him. And so likewise, if a man grants a lease for life to *A.*, reserving rent, with Reversion to *B.* and his heirs, *B.* hath a remainder descendible to his heirs general, and not a Reversion to which the rent is incident; but the grantor shall be entitled to the rent, during the continuance of *A.*'s estate. 2 *Comm. c.* 11. cites *Cro. Eliz.* 321: 3 *Lev.* 407: 1 *And.* 23.

When the particular estate determines, then the Reversion comes into possession, and before it is separated from it; for he who hath the possession cannot have the Reversion, because, by uniting them, the one is drowned in the other. 2 *Lill. Abr.* 484. See title *Merger*.

The Reversion of land when it falls, is the land itself; and the possession of the tenant preserves the Reversion of the lands, with the rents, &c. in the donor or lessor. 1 *Inst.* 324.

A Reversion of an estate of inheritance may be granted by bargain and sale inrolled, lease and release, fine, &c. And by the grant of lands a Reversion will pass; though by the grant of a Reversion, land in possession will not pass. 6 *Rep.* 36: 5 *Rep.* 124: 10 *Rep.* 107.

If one have a Reversion in fee, expectant on a lease for years, he may make a bargain and sale of his Reversion for one year, and then make a release to the bargainee in fee; by which the Reversion in fee will pass to the bargainee. 2 *Lill. Abr.* 483. And a Reversioner may covenant to stand seised of a Reversion to uses, &c. 11 *Rep.* 46. Likewise a Reversion may be devised by will; and a testator being seised in fee of lands which he had in possession, and of other lands in Reversion, devised all his lands for payment of debts; adjudged that by the words "all his lands," the Reversion as well as the possession passed. 2 *And.* 59: *Cro. Eliz.* 159.

A person devised a manor to *A. B.* for six years, and some other lands to *C. D.* and his heirs: and all the rest of his lands to his brother, and the heirs male of his body: and it was held that these words, "the rest of his lands," did not only extend to the lands which were

not devised before, but to the reversion in fee of the manor, after the determination of the estate for years. *Allen* 28. And by devise of all lands, tenements, and hereditaments, undisposed of before in a will, a Reversion in fee will pass. 2 *Vent.* 285: 3 *Nels. Abr.* 166.

One seised of lands in fee, devises part thereof to *B.* for life, and after, by the same will, gives to *C.* all his lands not before particularly disposed of; by this devise of "all lands," &c. the Reversion of the part given for life passes to *C.* *Preced. Chan.* 202. See title *Will*.

There was lessee for years, remainder for life, Reversion in fee, the tenant for life died, and the lessee for years did not attorn to him in the Reversion; yet it was resolved, that it passed without attornment, and he might bring an action of debt, or avow. *Hetl.* 73. See title *Attornment*.

If tenant for life, and he in Reversion, join in a lease for life, or gift in tail, rendering rent, it shall enure after the death of tenant for life, to him in Reversion. 1 *Inst.* 214.

The particular estate for life or years, and the estate of him in Reversion, are divers and distinct; therefore aid may be prayed of him in Reversion: Yet these estates have relation one to another. 3 *Shep. Abr.* 220.

Copyholder for life, cannot, by forfeiture or otherwise, destroy the estate in Reversion: And he who hath a Reversion cannot be put out of it, unless the tenant be ousted of his possession also. 39 *Hen.* 6: *Plowd.* 162: *Yelv.* 1.

Reversions expectant on an estate-tail, are not assets, or of any account in law, because they may be cut off by fine and recovery; but it is otherwise of a Reversion on an estate for life, or years. 1 *Inst.* 173: 6 *Rep.* 38. See title *Assets*.

No lease, rent-charge, or estate, &c. made by tenant in tail in remainder, shall charge the possession of the reversioner. 2 *Lil.* 448. But as no statute hath made any provision for those who have remainders, or Reversions on any estate-tail they are barred by a recovery. 10 *Rep.* 32. See title *Recovery*.

There were no Reversions or remainders on estates in tail, at Common Law: And by the Common Law, no grantee of a Reversion could take advantage of any condition or covenant broken by the lessees of the same land; but by statute, grantees of Reversions may take advantage of conditions and covenants against lessees of the same lands, as fully as the lessors and their heirs; and the lessees may have the like remedies against the grantees of Reversions, &c. 1 *Inst.* 327. See *stat.* 32 *H.* 8. c. 34: And titles *Condition*; *Lease*.

A reversioner may bring an action on the case for spoiling trees; so for any injury to his Reversion, he may have this action, but he cannot have trespass, which is founded on the possession. 3 *Lev.* 209. 233: 3 *Co.* 55.

He in Reversion shall have a writ of *entry ad communem legem*, where tenant for life, &c. aliens the lands: And writ of intrusion after their deaths, &c. *New Nat. Br.* 461. But see title *Recovery*.

How to plead a Reversion in fee. 2 *Lutw.* 1174.

In order to assist such persons as have any estate in remainder, Reversion, or expectancy after the death of others, against fraudulent concealments of their deaths, the *stat.* 6 *Ann.* c. 18. provides, that all persons on whose lives any lands are holden, shall, (on application to the Court of Chancery, and order made thereon,) once in every year,

if required, be produced to the court, or its commissioners; or, upon neglect or refusal, they shall be taken to be actually dead, and the person entitled to such expectant estate may enter upon and hold the lands and tenements till the party shall appear to be living. See title *Life-Estate*.

REVERSIONS IN OFFICES; Vide *Office*.

REVIEW, BILL OF; in *Chancery*. The object of this is to procure an examination and reversal of a decree, made upon a former bill, and signed by the person holding the great seal, and inrolled. It may be brought upon error of law appearing in the body of the decree itself, or upon discovery of new matter. In the first case the decree can only be reversed upon the ground of the apparent error; as if an absolute decree be made against a person, who, upon the face of it, appears at the time to have been an infant. A bill of this nature may be brought without leave of the Court previously given. But if it is sought to reverse a decree signed and inrolled upon discovery of some new matter, the leave of the court must be first obtained; and this will not be granted but upon allegation, upon oath, that the new matter could not be produced or used by the party claiming, at the time when the decree was made. If the Court is satisfied, that the new matter is relevant and material, and such as might probably have occasioned a different determination, it will permit a bill of Review to be filed. See *Mitf. Treat. on Chance. Pleadings* 78; and the authorities there cited: See also this Dictionary, title *Chancery; Decree*.

A Bill of Review, upon new matter discovered, has been permitted, even after an affirmance of the decree in Parliament; but it may be doubted, whether a bill of review, upon error in the decree itself, can be brought after such affirmance. If, upon a Bill of Review, a decree has been reversed, another Bill of Review may be brought upon the decree of reversal: But see 1 *Vern.* 417. But when twenty years have elapsed from the time of pronouncing a decree, which has been signed and inrolled, a Bill of Review cannot be brought: and after a demurrer to a Bill of Review has been allowed, a new bill of Review on the same ground cannot be brought. It is a rule of the Court, that the bringing a Bill of Review shall not prevent the execution of the decree impeached; and if money is directed to be paid it ought regularly to be paid before the Bill of Review is filed, though it may afterwards be ordered to be refunded. *Mitf. Treat.* 79, 80.

In a bill of this nature it is necessary to state the former bill, and the proceedings thereon; the decree, and the point in which the party exhibiting the Bill of Review conceives himself aggrieved by it; and the ground of Law, or new matter discovered, upon which he seeks to impeach it; and if the decree is impeached on the latter ground, it seems necessary to state in the bill the leave obtained to file it, and the fact of the discovery; though it may be doubted, whether after leave given to file the bill that fact is traversable. The bill may pray simply, that the decree may be reviewed, and reversed in the point complained of, if it has not been carried into execution. If it has been carried into execution, the bill may also pray the farther decree of the Court, to put the party complaining of the former decree, into the situation in which he would have been if that decree had not been executed. If the bill is brought to review the reversal of a former decree, it may pray that the origi-

nal decree may stand. The bill may also, if the original decree has become abated, be at the same time a bill of Revivor: (See title *Revivor*.) A supplemental bill may likewise be added, if any event has happened which requires it; and, particularly, if any person, not a party to the original suit, becomes interested in the subject, he must be made a party to the Bill of Review, by way of supplement. *Mitf. Treat.* 80, 81.

To render a Bill of Review necessary, the decree sought to be impeached must have been signed and inrolled. If, therefore, this has not been done, a decree may be examined and reversed upon a species of supplemental bill *in nature of a Bill of Review*, where any new matter has been discovered since the decree. As a decree not signed and inrolled may be altered upon a re-hearing, without the assistance of a Bill of Review, if there is sufficient matter to reverse it appearing upon the former proceedings; the investigation of the decree must be brought on by a petition of re-hearing; and the office of the supplemental bill, in nature of a Bill of Review, is to supply the defect which occasioned the decree upon the former bill. It is necessary to obtain the leave of the Court to bring a supplemental bill of this nature; and the same affidavit is required for this purpose, as is necessary to obtain leave to bring a Bill of Review on discovery of new matter. The bill, in its frame, nearly resembles a bill of Review; except, that instead of praying that the former decree may be reviewed and reversed, it prays that the cause may be heard with respect to the new matter, made the subject of the supplemental bill, at the same time that it is re-heard upon the original bill; and that the plaintiff may have such relief as the nature of the case made by the supplemental bill requires. *Mitf. Treat.* 81—83.

If a decree is made against a person who had no interest at all in the matter in dispute, or had not such an interest as was sufficient to render the decree, against him, binding upon some person claiming the same, or a similar interest, relief may be obtained against error in the decree by a bill in the nature of a Bill of Review. Thus, if a decree is made against a tenant for life only, a remainder-man in tail, or in fee, cannot defeat the proceedings against the tenant for life, but by a bill shewing the error in the decree, the incompetency in the tenant for life to sustain the suit, and the accruer of his own interest; and thereupon praying that the proceedings in the original cause may be reviewed, and, for that purpose, that the other party may appear to, and answer this new bill, and that the rights of the parties may be properly ascertained. A bill of this nature, as it does not seek to alter a decree made against the plaintiff himself, or against any person under whom he claims, may be filed without leave of the Court. *Mitf. Treat.* 83.

REVIEW OF APPEAL OF DELEGATES, A commission granted by the King to certain Commissioners, &c. See title *Appeal to Rome*.

REVILING CHURCH ORDINANCES, Is a positive offence against religion, that affects the established church; and the reviling the sacrament of the Lord's Supper, is punished by *stats.* 1 *Ed.* 6. c. 1: 1 *Eliz.* c. 1. with fine and imprisonment: And by *stat.* 1 *Eliz.* c. 2. if any minister shall speak any thing in derogation of the book of *Common Prayer*, he shall, if not beneficed, be imprisoned one year for the first offence, and for life for the second: And if he be beneficed, he shall for the first offence be imprisoned six months, and forfeit a

year's value of his benefice: for the second offence he shall be deprived, and suffer one year's imprisonment; and for the third, shall, in like manner, be deprived, and suffer imprisonment for life. And if *any person* whatsoever shall, in plays, songs, or other open words, speak any thing in derogation, defaming, or despising of the said book, or shall forcibly prevent the reading of it, or cause any other service to be used in its stead, he shall forfeit for the first offence one hundred marks; for the second, four hundred; and for the third shall forfeit all his goods and chattels, and suffer imprisonment for life. The policy and propriety of these punishments, even at this distance from the Reformation, are well stated by *Blackstone*. 4 *Comm. c. 4. p. 51.*

REVIVAL OF PERSONS HANGED; See *Execution of Criminals*.

REVIVING, A word metaphorically applied to rents and actions, and signifies renewing them after they are extinguished. Of which see many examples in *Brooke*, title *Revivings of Rents, Actions, &c.* 23. See also 19 *Vin. Abr.* 228—230.

REVIVOR, BILL OF; When a bill hath been exhibited in Chancery, against one who answers, and before the cause is heard, or if heard, and the decree is not inrolled, either party dies, or a female plaintiff marries; in these cases a bill of Revivor must be brought.

A bill of Revivor must state the original bill, and the several proceedings thereon, and the abatement: It must shew a title to revive, and charge that the cause ought to be revived, and stand in the same condition, with respect to the parties in the Bill of Revivor, as it was in with respect to the parties to the original bill, at the time the abatement happened; and it must pray, that the suit may be revived accordingly. It may likewise be necessary to pray that the defendant may answer the bill of Revivor; as in the case of a requisite admission of assets, by the representative of a deceased party. In this case, if the defendant does admit assets, the cause may proceed against him on an order of Revivor merely; but if he does not make that admission, the cause must be heard for the purpose of obtaining the necessary accounts of the estate of the deceased party, to answer the demands made against it by the suit; and the prayer of the bill, therefore, in such cases, usually is, not only that the suit may be revived, but also that in case the defendant shall not admit assets, to answer the purposes of the suit, those accounts may be taken; and so far the bill is in the nature of an original bill. If a defendant to an original bill dies before putting in an answer, or after an answer to which exceptions have been taken, or after an amendment of the bill, to which no answer has been given, the bill of Revivor, though requiring in itself no answer, must pray that the person, against whom it seeks to revive the suit, may answer the original bill, or so much of it as the exceptions taken to the answer of the former defendants extend to, or the amendment remaining unanswered. See *Mitf. Treat. on Pleadings in Chancery*. 70, 71; and the authorities there referred to.

Upon a bill of Revivor the defendant must answer in eight days after appearance, and submit that the suit shall be revived, or shew cause to the contrary; and in default, unless the defendant has obtained an order for further time to answer, the suit may be revived without answer, by an order made upon motion as a matter of course. The ground for this is an allegation, that the time allowed the defendant to answer by the course of the Court is expired, and that no

answer is put in; it is therefore presumed, that the defendant can shew no cause against reviving the suit in the manner prayed by the bill. *Mitf. Treat.* 71, 72.

An order to revive may also be obtained, in like manner, if the defendant puts in an answer submitting to the Revivor; or even without that submission if he shews no cause against the Revivor. Though the suit is revived of course, in default of the defendant's answer within eight days, he must yet put in an answer if the bill requires it; as if the bill seeks an admission of assets, or calls for an answer to the original bill; the end of the order of Revivor being only to put the suit and proceedings in the situation, in which they stood at the time of the abatement, and to enable the plaintiff to proceed accordingly. And notwithstanding an order for Revivor has been thus obtained, yet if the defendant conceives that the plaintiff is not entitled to revive the suit against him, he may take those steps which are necessary to prevent the farther proceeding on the bill; and though these steps should not be taken, yet if the plaintiff does not shew a title to revive, he cannot finally have the benefit of the suit, when the determination of the Court is called for on the subject. *Mitf. Treat.* 72, 73.

After a decree, a *defendant* may file a bill of Revivor, if the plaintiffs, or those standing in their right, neglect to do it. For then the rights of the parties are ascertained, and plaintiffs and defendants are equally entitled to the benefit of the decree, and equally have a right to prosecute it. The bill of Revivor, in this case therefore, merely substantiates the suit, and brings before the Court the parties necessary to see to the execution of the decree, and to be the objects of its operation: rather than to litigate the claims made by the several parties in the original pleadings, except so far as they remain undecided. In the case of a bill by creditors, on behalf of themselves and other creditors, any creditor is entitled to revive. A suit, become entirely abated, may be revived as to part only of the matter in litigation; or as to part by one bill, and as to the other part by another. Thus, if the rights of a plaintiff in a suit, upon his death, become vested, part in his real, and part in his personal representatives, the real representative may revive the suit so far as concerns his title; and the personal so far as his demand extends. *Mitf. Treat.* 73, 74.

When the interest of a party dying is transmitted to another, in such a manner that the transmission may be litigated in a Court of Equity, as in the case of a devise, the suit cannot be revived by or against the person to whom the interest is so transmitted; but such person, if he succeeds to the interest of a plaintiff, is entitled to the benefit of the former suit; and if he succeeds to the interest of a defendant, the plaintiff is entitled to the benefit of the former suit against him: This benefit is to be obtained by an original bill, *in nature* of a bill of Revivor. A bill for this purpose must state the original bill, the proceedings upon it, the abatement, and the manner in which the interest of the party dead has been transmitted; and it must charge the validity of the transmission, and state the rights which have accrued by it. The bill is said to be original, merely for want of that privity of title, between the party to the former and the party to the latter bill, though claiming the same interest, which would have permitted the continuance of the suit by bill of Revivor. Therefore, when the validity of the alleged transmission of interest is esta-

blished, the party to the new bill shall be equally bound by, or have advantage of, the proceedings on the original bill, as if such privity had actually existed: And the suit is considered as pending, from the time of filing the original bill; so as to save the Statute of Limitations; to have the advantage of compelling the defendant to answer, before an answer can be compelled, to a cross-bill; and every other advantage which would have attended the institution of the suit by the original bill, if it could have been continued by bill of Revivor merely. *Mitf. Treat.* 88, 89.

If the interest of a plaintiff or defendant, suing or defending in his own right, wholly determines, and the same property becomes vested in another person, not claiming under him, the suit cannot be continued by a bill of Revivor; nor can its defect be supplied by a supplemental bill, but the benefit of the former proceedings must be obtained by an original bill in the nature of a supplemental bill. *Mitf. Treat.* 89, 90.

REVOCATION, *Revocatio*.] The calling back of a thing granted; or a destroying or making void of some deed that had existence, until the act of Revocation made it void. 2 *Lill. Abr.* 485. A Revocation may be either general, of all acts and things done before; or special, to revoke a particular thing: And where any deed or thing is revoked, it is as if it never had been. 5 *Rept.* 90: *Perk.* § 105. In voluntary deeds and conveyances, there are frequently provisos containing power of Revocation, which being coupled with an use, and tending to pass by raising of uses, according to the *stat.* 27 *Hen.* 8. c. 10. are allowed to be good, and not repugnant; as where one seised of an estate in fee, covenants to stand seised thereof to the use of himself for life, and after to the use of his son in tail, remainder over, &c. with proviso that he may revoke any of the said uses; now, if afterwards he revokes them, he is seised again in fee, without entry or claim: But in case of a feoffment or other conveyance, whereby the feoffee or grantee is in by the Common Law, such proviso would be merely repugnant and void. 1 *Inst.* 237. See title *Uses*.

Voluntary estates made with power of Revocation, as to purchasers, are held in equal degree with conveyances made by fraud and covin to defraud purchasers, under *stat.* 27 *Eliz.* c. 4: 3 *Rept.* 82. See title *Frauds*.

Where a power of Revocation is reserved for a man to dispose of his own estate, it shall always have a favourable construction; but it shall be taken strictly when it is to charge the estate of another. 2 *Vent.* 250.

If power is reserved to a man to revoke a deed by writing, subscribed and sealed in the presence of two or more credible witnesses: if he makes his will in writing, without making any express Revocation, it will be a good Revocation, and the will a good execution of the power. *Hob.* 312: *Raym.* 295. But see title *Power*.

If a person make a feoffment in fee, or levy a fine, &c. of the lands, before the deed of Revocation is executed; these amount to a Revocation in law, and extinguish the power of Revocation. 1 *Vent.* 371: 1 *Rept.* 111.—Power of Revocation may be released; and where a man has an entire power of Revocation, and he suspends or extinguishes it as to part, he may revoke as to the residue, if the conveyance was by way of use; but not where a condition is annexed to the land. 1 *Rept.* 174: *Moor.* 615.

A will is revocable; and a last will revokes the former: And a new

publication of the first will, if made in due form, will revoke the last. *Perk.* 479: 2 *Sid.* 2: 3 *Mod.* 207. See title *Wills*.

Letters of attorney and other authorities may be revoked, by the persons giving the powers; and as they are revocable in their nature, it has been adjudged, that they may be revoked, though they are made irrevocable. 8 *Rep.* 82: *Wood's Inst.* 286. These Revocations of all powers regularly must be made after the same manner they are given; and there ought to be notice to the party, &c. But if once the power be executed, a Revocation after will come too late. *Dyer* 210.

A warrant of attorney from a defendant to appear and accept a declaration and plead for the defendant, may not be revoked with an intent to stay the plaintiff's proceedings; but the defendant on good cause shewn to the Court may change his attorney, so as he plead by another in due time. 2 *Lill.* 486.

As to the Revocation of *Letters of Administration*, and *Presentations* to benefices, see those titles.

REVOCATIONE PARLIAMENTI, An antient writ for recalling Parliament: and *anno* 5 *Ed.* 3. the Parliament being summoned, was recalled by such writ before it met. *Prynne's Animad.* on 4 *Inst.* fol. 44. See title *Parliament*.

REWARDS. In order to encourage the apprehending of certain felons, Rewards, and immunities are bestowed on such as bring them to justice, by divers statutes. The *stat.* 4 & 5 *W. & M.* c. 8. enacts, That such as apprehend a highwayman, (and by *stat.* 6 *Geo.* 1. c. 23.) highway robbers in the streets of *London*, or other towns, and prosecute him to conviction, shall receive a reward of 40*l.* from the public; to be paid to them (or, if killed in the endeavour to take him, their executors) by the sheriff of the county; besides the horse, furniture, arms, money, and other goods taken upon the person of such robber; with a reservation of the right of any person from whom the same may have been stolen: to which *stat.* 8 *Geo.* 2. c. 16. superadds 10*l.* to be paid by the hundred indemnified by such taking. By *stat.* 6 & 7 *W.* 3. c. 17: 15 *Geo.* 2. c. 28. persons apprehending and convicting any offender against those statutes respecting the coinage, (shall in case the offence be treason or felony) receive a Reward of forty pounds; or ten pounds, if it only amount to counterfeiting the copper coin. By *stat.* 10 & 11 *W.* 3. c. 23. any person apprehending and prosecuting to conviction a felon guilty of burglary, house-breaking, horsestealing, or private larceny to the value of 5*s.*, from any shop, warehouse, coach-house, or stable, shall be excused from all parish offices: (which is vulgarly termed, having a Tyburn-ticket): And by *stat.* 5 *Ann.* c. 31. any person so apprehending, and prosecuting a burglar, or felonious housebreaker, (or, if killed in the attempt, his executors,) shall also be entitled to a Reward of 40*l.* By *stat.* 6 *Geo.* 1. c. 23. persons discovering, apprehending, and prosecuting to conviction, any person taking Reward for helping others to their stolen goods, shall be intitled to 40*l.*—By *stat.* 14 *Geo.* 2. c. 6. explained by *stat.* 15 *Geo.* 2. c. 34. any person apprehending and prosecuting to conviction, such as steal, or kill with intent to steal, any sheep, lamb, bull, cow, ox, steer, bullock, heifer, or calf, shall for every such conviction receive a Reward of 10*l.*—Lastly, by *stats.* 16 *Geo.* 2. c. 15: 8 *Geo.* 3. c. 15. persons discovering, apprehending, and convicting felons, and others, being found at large during the term for which they are ordered to be transported, shall receive a Reward of 20*l.*

The *stats.* 4 & 5 *W. & M.* c. 8: 6 & 7 *W.* 3. c. 17: 5 *Ann.* c. 31:

together with *stat. 3 Geo. 1. c. 15. § 4.* which directs the method of reimbursing the sheriffs, are extended to the county palatine of *Durham*, by *stat. 14 Geo. 3. c. 46.*

In the spirit of the above statutes, the *stats. 9 Geo. 1. c. 22: 10 Geo. 2. c. 32.* allow a recompence of 50*l.* to persons maimed in endeavouring to apprehend offenders against the Black act, destroyers of sea-banks, cutters of hopbinds, and firers of collieries. And by *stat. 19 Geo. 2. c. 34.* several strong regulations are made for recompensing persons wounded or plundered by smugglers; and Rewards of 50*l.* are given to accomplices in smuggling, discovering two or more offenders; and one of 500*l.* for detecting proclaimed smugglers in certain cases.

REWEY, A term among clothiers, signifying cloth unevenly wrought, or full of Rewes. See *stat. 43 Eliz. cap. 10.*

RHANDIR, A part in the division of *Wales* before the Conquest: Every township comprehended four gavels, and every gavel had four Rhandirs, and four houses or tenements constituted every Rhandir. *Taylor's Hist. Gav. p. 69.*

RIAL, from the Span. *Real*, i. e. Real Money, because it is stamped with the King's effigies: In *England*, a Rial was a piece of gold coin, current for 10*s.* in the reign of King *Henry VI.* at which time there were Half Rials passing for 5*s.* and Quarter Rials, or Rial Farthings, going for 2*s.* 6*d.* In the beginning of Queen *Elizabeth's* reign, golden Rials were coined at 15*s.* a-piece; and 3 *Jac. I.* there were Rose Rials of gold at 30*s.* Spur Rials at 15*s.* *Lowndes's Essay on Coins, p. 38.*

RIBAUD, Fr. *Ribauld, Ribaldus.*] A rogue, vagrant, whore-monger, or person given to all manner of wickedness: *Anno 50 E. 3.* there was a petition in parliament against Ribauds and sturdy beggars.

RICE, As to the importation of, see titles *Navigation Acts; Customs on Merchandise.*

RIDER-ROLL, A schedule, or small piece of parchment, often added to some part of a roll, record, or act of parliament.

RIDGE-WASHED KERSEY, *Kersey* cloth made of fleece wool, washed only on the sheep's back. See *stat. 35 Eliz. c. 10.*

RIDING ARMED; See *Armour and Arms.*

RIDING-CLERK, One of the six Clerks in Chancery, who in his turn, for one year, keeps the controlment-books of all grants that pass the Great Seal. *Blount.*

RIDINGS, corrupted from *Trithings.*] Are the names of the parts or divisions of *Yorkshire*, which are three, viz. East-Riding, West-Riding, and North-Riding, mentioned in *stat. 22 Hen. 8. c. 5:* And, in indictments for offences in that county, the town and the Riding must be expressed, *&c. West. Symb. p. 2.* See 1 *Comm. 116:* and this Dictionary, titles *Rafe; Registry of Deeds.*

RIENS ARREAR, A plea used in an action of debt for arrearages of account, whereby the defendant alleges that there is *nothing in arrear.* *Book Entr.* See titles *Account; Issue; Pleading.*

RIENS PASSE PER LE FAIT, *Nothing passes by the Deed;* The form of an exception taken in some cases to an action. *Broke.* See title *Pleading.*

RIENS PER DESCENT, The plea of an heir, where he is sued for his ancestor's debt, and hath no land from him by Descent, or assets in his hands. 3 *Cro. 151.* In an action of debt against the heir, who

pleads *Riens per Descent*, judgment may be had presently; and when assets descend, a *scire facias* lies against the heir, &c. 8 *Rep.* 134. See title *Heir*.

RIER COUNTY, *Retro Comitatus*, from the Fr. *Arrear*, i. e. *posterior*.] Is opposed to full and open county; and appears to be some public place, which the sheriff appoints for receipt of the King's money, after the end of his county-court. See *stat.* 2 *Ed.* 3. c. 5: and also *stat.* West. 2. 13 *Ed.* 1. c. 38: *Fleta*, l. 2. c. 67.

RIFFLARE, from the Saxon, *riefe*, *rafina*.] To take away any thing by force; from whence comes our *English* word *rifle*. *Leg. Hen.* 1. c. 57.

RIFFLUAR, A slight wound in the flesh. *Fleta*, lib. 1. c. 41.

RIGHT, *Jus*.] In general signification, includes not only a Right for which a writ of Right lies, but also any title or claim, either by virtue of a condition, mortgage, or the like, for which no action is given by law, but only an entry. *Co. Litt.* l. 3. c. 8. § 445.

There is *jus proprietatis*, a Right of property, *jus possessionis*, a Right of possession; and *jus proprietatis & possessionis*, a Right both of property and possession; and this was antiently called *jus duplicatum*: For example, if a man be disseised of an acre of land, the disseisee hath *jus proprietatis*, the disseisor hath *jus possessionis*; and if the disseisee release to the disseisor, he hath *jus proprietatis & possessionis*. *Co. Litt.* l. 3. § 447. See *Title*.

Jus est sextuplex. 1. *Jus recuperandi.* 2. *Intrandi.* 3. *Habendi.* 4. *Retinendi.* 5. *Percipiendi.* 6. *Et possidendi.* 8 *Co. Ed.* *Altham's case*.

The disseisor has only the naked possession, because the disseisee may enter and evict him; but against all other persons the disseisor has Right, and in this respect only can be said to have the Right of possession; for in respect to the disseisee, he has no right at all. But when a descent is cast, the heir of the disseisor has *jus possessionis*, because the disseisee cannot enter upon his possession, and evict him, but is put to his real action, being the freehold cast upon the heir. The notions of the law do make this title to him, that there may be a person in being to do the feudal duties, to fill the possession, and to answer the actions of all persons whatever; and since it is the law that gives him this Right, and obliges him to these duties; antecedent to any act of his own, it must defend such possession from the act of any other person whatever; till such possession be evicted by judgment; which being also the act of law may destroy the heir's title. *Gilb. Ten.* 18. See further, titles *Estate*; *Property*; *Release*; *Title*.

There is also a present and future Right; a *jus in re*, which may be granted to a stranger; and what is called a naked Right, or *jus ad rem*, where an estate is turned to a Right, on a discontinuance, &c. *Co. Litt.* 345.

Right doth also include an estate *in esse* in conveyances; and therefore if tenant in fee-simple makes a lease and release of all his Right in the land to another, the whole estate in fee passes. *Wood's Inst.* 115, 116.

Sir *Edward Coke* tells us, That of such an high estimation is Right, that the law preserveth it from death and destruction; trodden down it may be, but never trodden out: And there is such an extreme enmity between an estate gained by wrong and an antient Right, that the Right cannot possibly incorporate itself with the estate gained by wrong. 1 *Inst.* 279: 6 *Rep.* 70: 8 *Ref.* 105. A Right may sometimes

sleep, though it never dies; a long possession, exceeding the memory of man, will make a Right; and if two persons are in possession by divers titles, the law will adjudge the possession in him that hath the Right. *Co. Litt.* 478: 6 *Litt.* § 158: When there is no remedy, there is presumed to be no Right by law. *Vaugh.* 38.

RIGHT CLOSE, Writ of; See title *Recto, Writ of Right*.

RIGHT CLOSE, *secundum Consuetudinem Manerii*.] A writ which lies for the King's tenants in antient demesne, and others of a similar nature, to try the Right of their lands and tenements in the court of the lord exclusively. See *Writ*.

RIGHT IN COURT; See *Rectus in Curia*.

RIGHTS AND LIBERTIES; See title *Liberty*.

RINE, Saxon, *Ryne*.] A water-course, or little stream, which rises high with floods.

RINGA, A military girdle; from the Sax. *Ring*, i. e. *annulus circulus*, because it was girt round the middle: But, according to *Bracton*, *Ringa enim dicuntur quod renes circumdant, unde dicitur accingere gladio*. *Bract. lib.* 1. c. 8.

RINGHEAD, An engine used in stretching of cloth. See *stat.* 43 *Eliz.* c. 10.

RINGILDRE, A kind of bailiff or serjeant; and such *Rhingyl* signifies in *Welsh. Chart. Hen.* 7.

RIOT;

ROUT; AND UNLAWFUL ASSEMBLY.

RIOT, *Riota* and *Riotum*, from the French, *Riotte*; *quod non solum rixam & jurgium significat, sed vinculum etiam, quo plura in unum, fasciculorum instar, colligantur*.] The forcible doing of an unlawful thing by three, or more persons assembled together for that purpose. *West. Symbol. part* 2. title *Indictments*, § 65.

The difference, between a Riot, Rout, and unlawful Assembly, see in *Lamb. Eiren. lib.* 2. c. 5: *Kitchin* 19; the latter of whom gives these examples of Riots; the breach of inclosures, banks, conduits, parks, pounds, houses, barns, the burning of stacks of corn, &c. *Lamb. ubi supra*, mentions these; to beat a man, to enter upon a possession forcibly. *Cowell*.

I. *What are considered as Riots, Routs, and unlawful Assemblies, at Common Law.*

II. *The Punishment of these Offences: And the Provisions against them, by statute Law.*

I. *HOLT*, Ch. J. in delivering the opinion of the Court, said, That the books are obscure in the definition of Riots, and that he took it, that it is not necessary to say, they assembled for that purpose; but there must be an unlawful assembly; and as to what act will make a Riot or trespass, such an act as will make a trespass will make a Riot; as, if a number of men assemble with arms, *in terrorem populi*, though no act is done; so if three come out of an alehouse, and go armed. 11 *Mod.* 116, 117. See *Hob.* 91.

Hawkins says, a *Riot* seems to be a tumultuous disturbance of the peace by three persons, or more, assembling together of their own authority, with an intent mutually to assist one another against any who shall oppose them in the execution of some enterprise of a pri-

vate nature; and afterwards actually executing the same in a violent & turbulent manner to the terror of the people, whether the act intended was of itself lawful or unlawful. 1 *Hawk. P. C. c. 65. § 1.*

A *Rout* seems to be, according to the general opinion, a disturbance of the peace by persons assembling together with an intent to do a thing, which, if it be executed, will make them Rioters, and actually making a motion towards the execution thereof; but, by some books, the motion of a Riot is confined to such assemblies only as are occasioned by some grievance common to all the company, as the inclosure of land, in which they all claim a right of common, &c. However, inasmuch as it generally agrees with a Riot, as to all the rest of the above-mentioned particulars, requisite to constitute a Riot, except only in this, that it may be a complete offence without the execution of the intended enterprise, it seems not to require any farther explication. 1 *Hawk. P. C. c. 65. § 8.*

An *unlawful Assembly*, according to the common opinion, is a disturbance of the peace by persons barely assembling together, with an intention to do a thing, which, if it was executed, would make them rioters, but neither actually executing it, nor making a motion toward the execution of it; but (says *Hawkins*) this seems to be much too narrow a definition; for any meeting whatsoever of great numbers of people, with such circumstances of terror, as cannot but endanger the public peace, and raise fears and jealousies among the King's subjects, seems properly to be called an Unlawful Assembly; as where great numbers, complaining of a common grievance, meet together armed in a warlike manner, in order to consult together concerning the most proper means for the recovery of their interests; for no one can foresee what may be the event of such an assembly. 1 *Hawk. P. C. c. 65. § 9.*

These offences are thus defined and distinguished by *Blackstone*: An *Unlawful Assembly* is, when three or more do assemble themselves together to do an unlawful act, as, to pull down inclosures, to destroy a warren, or the game therein; and part, without doing it, or making any motion towards it. 3 *Inst.* 176. A *Rout* is where three or more meet to do an unlawful act upon a common quarrel; as, forcibly breaking down fences, upon a right claimed of common, or of way, and make some advances towards it. *Bro. Abr.* title *Riot* 4, 5. A *Riot*, is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel: 3 *Inst.* 176: As if they beat a man, or hunt and kill game in another's park, chase, warren, or liberty: or do any other unlawful act, as removing a nuisance in a violent and tumultuous manner. 4 *Comm. c. 11. p. 146.*

If a man be in his house, and he hears that *J. S.* will come to his house to beat him, he may well make an assembly of people of his friends and neighbours to assist and aid him in safe keeping his person. *Per Fineux*, Ch. Jus. Br. *Riots*, *pl.* 1. cites 21 *Hen. 7.* 39.

But if a man be menaced or threatened, that if he comes to the market of *B.* or to *W.* that he shall be beat, he cannot make an assembly of people to assist him to go there, and this in safeguard of his person; for he need not go there, and he may have remedy by surety of the peace; but the house of a man is to him his castle and his defence, and where he properly ought to abide, &c. Br. *Riots*, *pl.* 1, cites 21 *H. 7.* 39.

Hawkins, citing the above case, remarks, That such violent methods

cannot but be attended with the danger of raising tumults and disorders to the disturbance of the public peace.—Though a man may ride with arms, yet he cannot take two with him to defend himself, even though his life is threatened; for he is in the protection of the law, which is sufficient for his defence. See 1 *Hawk. P. C. c. 65. § 10*; *Dalt. J. c. 137*; 11 *Mod. 116, 117*.

If a number of people be assembled together in a lawful manner, and upon a lawful occasion, as for electing a Mayor, or the like, and during the assembly a sudden affray happens, this will not make it a Riot *ab initio*; but it is only a common affray. *Ld. Raym. 965*.

If a number of people assemble in a riotous manner to do an unlawful act, and a person, who was upon the place before upon a lawful occasion, and not privy to their first design, comes and joins himself with them, he will be guilty of a Riot equally with the rest. *Ld. Raym. Rep. 965*.

If several are assembled lawfully without any ill intent, and an affray happens, none are guilty but such as act; but if the assembly was originally unlawful, the act of one is imputable to all. *Per Holt, Ch. J. 2 Salk. 595*.

It seems agreed, that if a number of persons, being met together at a fair, or market, or church-ale, or any other lawful and innocent occasion, happen on a sudden quarrel to fall together by the ears, they are not guilty of a Riot, but of a sudden affray only, of which none are guilty, but those who actually engage in it; because the design of their meeting was innocent and lawful, and the subsequent breach of the peace happened unexpectedly without any previous intention concerning it; yet it is said that if persons innocently assemble together, do afterwards, upon a dispute happening to arise among them, form themselves into parties, with promise of mutual assistance, and then make affray, they are guilty of a Riot; because, upon their confederating together with an intention to break the peace, they may as properly be said to be assembled together for that purpose from the time of such confederacy, as if their first coming together had been on such a design; however, it seems clear, that if, in an assembly of persons met together on any lawful occasion whatsoever, a sudden proposal shall be started of going together in a body to pull down a house or inclosure, or to do any other act of violence, to the disturbance of the public peace, and such motion be agreed to and executed accordingly, the persons concerned cannot but be Roiters, because their associating themselves together for such a new purpose is no way extenuated by their having met at first upon another. 1 *Hawk. P. C. c. 65. § 3*.

II. THE punishment of unlawful Assemblies, if to the number of twelve, may, as hereafter fully noticed, be capital; according to the circumstances that attend them; but from the number of *three* to *eleven*, is by fine and imprisonment only. The same is the case in Riots and Routs by the common law; to which the pillory, in very enormous cases, has been sometimes superadded 4 *Comm. c. 11*.

By statute 34 *E. 3. c. 1*. Justices of the peace have power to restrain Roiters, &c. to arrest and imprison them, and cause them to be duly punished. By *stat. 17 R. 2. c. 8*. the sheriff, and other the King's ministers, generally have power to arrest Rioters with force. And by *stat. 18 H. 4. c. 7*. any two justices, together with the sheriff or

under-sheriff of the county, may come with the *posse comitatus* if need be, and suppress any Riot, Assembly, or Ront, arrest the Rioters, and record, upon the spot, the nature and circumstances of the whole transaction; which record alone shall be a sufficient conviction of the offenders: And if the offenders are departed, the said Justices, &c. shall within a month after, make inquiry thereof, and hear and determine the same; and if the truth cannot be found, then, within a further month, the justices and sheriffs are to certify to the King and council, &c. on default whereof the justices, &c. shall forfeit 100*l*.

These statutes are understood of great and notorious Riots: And the record of the Riot within the view of the justices, by whom it is recorded, is such a conviction as cannot be traversed, the parties being concluded thereby; but they may take advantage of the insufficiency of the record, if the justices have not pursued the statute, &c. It is said that, the offenders being convicted upon the record of their offence, in the presence of the justices, ought to be sent immediately to gaol, till they pay a fine assessed by the same justices; which fine is to be estreated into the exchequer; or the justices may record such Riot, and commit the offenders, and after certify the record into *B. R.* or to the assizes or sessions: If the offenders are gone, then the justices shall inquire by a jury; and the Riot being found, they are to make a record of it, and fine them, or receive their traverse, to be sent by the justices to the next quarter sessions, or into the King's Bench, to be tried according to Law. *Dalt.* 200, 201, 202.

It hath been adjudged, that where Rioters are convicted upon the view of two justices, the sheriff must be a party to the inquisition on the *stat. 13 Hen. 4. c. 7.* But if they disperse themselves before conviction, the sheriff need not be a party; for in such case the two justices may make the inquisition without them; and this is *pro domino Rege*: And if the justices neglect to make an inquisition within a month after the Riot, they are liable to the penalty for not doing it within that time; but the lapse of the month doth not determine their authority to make an inquisition afterwards. *2 Salk.* 592.

In the interpretation of the above *stat. 13 Hen. 4. c. 7.* it hath also been holden, that all persons, noblemen and other, except women, clergymen, persons decrepit, and infants under fifteen, are bound to attend the justices, in suppressing a Riot, upon pain of fine and imprisonment: And that any battery, wounding, or killing the Rioters, that may happen in suppressing the Riot, is justifiable. *1 Hal. P. C.* 495: *1 Hawk. P. C. c. 65. § 20, 21.*

On the above, *Blackstone* remarks, that our antient law seems pretty well to have guarded against any violent breach of the public peace; especially as any Riotous Assembly, on a public or general account, as to redress grievances, or pull down all inclosures, and also resisting the King's force, if sent to keep the peace, may amount to overt acts of high treason, by levying war against the King.—This observation will appear confirmed, by a statement of the following statutes, also made on this subject. And see further *1 Hawk. P. C. c. 65.*

Rioters convicted on view of two justices, and of the sheriff of the county, are to be fined by the two justices and the sheriff; and if the sheriff do not join in setting the fine, it is error; for the statute requires that he should be joined with the justices in the whole proceedings. *Raym.* 386. By *stat. 2 Hen. 5. st. 1. c. 8.* If the Justices

make default in inquiring of a Riot, at the instance of the party grieved, the King's commission shall be issued to inquire as well of the Riots as of the default, by sufficient and indifferent men of the county, at the discretion of the chancellor; and in case the sheriff is in default, the coroners shall make the panel of inquest upon the said commission, which is returnable into the chancery, &c. and by this statute heinous Rioters are to suffer one year's imprisonment.

The lord chancellor, having knowledge of a Riot, may send the King's writ to the justices of peace, and to the sheriff of the county, &c. requiring them to put the statute in execution; and the chancellor, upon complaint made, that a dangerous Rioter is fled into places unknown, and on suggestion, under the seals of two justices of peace and the sheriff, that the common fame runneth in the county of the Riot, may award a *capias* against the parties, returnable in chancery upon a certain day, and afterwards a writ of proclamation, returnable in the King's Bench, &c. *Stat. 2 H. 5. st. 1. c. 9; 8 H. 6. c. 14.*

Where Riots are committed, the sheriff, upon a precept directed to him, is to return twenty-four persons, dwelling within the county, to inquire thereof, &c. *Stat. 19 Hen. 7. c. 13.*

A mayor and alderman of a town making a Riot, are punishable in their natural capacities; but where they have countenanced dangerous Riots within their precincts, their liberties have been seised, or the corporation fined. *3 Cro. 252; Dalt. 204. 326.* Women may be punished as Rioters; but infants under the age of fourteen years are not punishable. *Dalt. 325; Wood's Inst. 429.*

The riotous assembling of twelve persons, or more, and not dispersing upon proclamation, was first made high treason by *stat. 3 & 4 Edw. 6. c. 5.* when the King was a minor, and a change in religion to be effected: but that statute was repealed by *stat. 1 Mar. c. 1.* among the other treasons created since the *25 Ed. 3.* though the prohibition was in substance re-enacted, with an inferior degree of punishment by *stat. 1 Mar. st. 2. c. 12.* which made the same offence a single felony. These statutes specified and particularized the nature of the Riots they meant to suppress; as for example, such as were set on foot with intention to offer violence to the privy council, or to change the laws of the kingdom, or for certain other specific purposes: in which cases, if the persons were commanded by proclamation to disperse, and they did not, it was by the statute of *Mary* made felony, but within the benefit of clergy; and the act also indemnified the peace-officers and their assistants, if they killed any of the mob in endeavouring to suppress such Riot. This was thought a necessary security in that sanguinary reign, when popery was intended to be re-established, which was like to produce great contents; but at first it was made only for a year, and was afterwards continued for that Queen's life. And by *stat. 1 Eliz. c. 16.* when a reformation in religion was to be once more attempted, it was revived and continued during her life also; and then expired. From the accession of *James I.* to the death of Queen *Anne*, it was never once thought expedient to revive it: but, in the first year of *George I.* it was judged necessary, in order to support the execution of the act of settlement, to renew it, and at one stroke to make it perpetual, with large additions. For, whereas the former acts expressly defined and specified what should be accounted a Riot, the statute *1 Geo. 1.*

stat. 2. c. 5. enacts, generally, That if any persons, to the number of twelve, are unlawfully assembled, to the disturbance of the peace, and any one justice of the peace, sheriff, under-sheriff, or mayor of a town, shall think proper to command them by proclamation to disperse, if they contemn his orders, and continue together for one hour afterwards, such contempt shall be felony without benefit of clergy. And farther, if the reading of the proclamation be by force opposed, or the reader be in any manner wilfully hindered from the reading of it, such opposers and hinderers are felons without benefit of clergy: and all persons to whom such proclamation *ought to have been made*, and knowing of such hindrance, and not dispersing, are felons without benefit of clergy. There is in this act also an indemnifying clause, in case any of the mob be unfortunately killed in the endeavour to disperse them; and, by a subsequent clause, if any person, so riotously assembled, begin, even before proclamation, to pull down any church, chapel, meeting-house, dwelling-house, or out-houses, they shall be felons without benefit of clergy: and inhabitants of towns and hundreds are to yield damages for rebuilding or reparation, to be levied and paid in such manner as money recovered against the hundred, by persons robbed on the highway, &c. (and see as to the mode of levying such money, 5 *Term Rep. K. B.* 541.) Prosecutions on this act are to be commenced within one year after the offence: This statute, being wholly in the affirmative, doth not take away any authority in the suppressing a Riot by Common law, or by other statutes. *Wood's Inst.* 430. See 4 *Comm.* 125. 433.

The owners of houses may recover damages for the destruction of their furniture, or for any injury to their property, done at the same time that the buildings are demolished, or in part pulled down. *Doug.* 673. (699). *Hyde v. Cogan.*

A person, present aiding and abetting Rioters, is a principal in the second degree under this statute. 4 *Burr.* 2073.

The Hundred is not liable in an action for damages brought by a person injured by a mob beginning to pull down his house, &c. unless the Riot be of such a kind as to amount to felony within *stat. 1 Geo. 1. stat. 2. c. 5.* The breaking the plaintiff's windows by a mob because he would not illuminate his house on a particular occasion was held not within the act. 7 *Term Rep. K. B.* 496.

Where a mob attacked a baker's house and broke his windows and compelled him to sell flour at a price named by themselves below the marketable value; this was held evidence for the jury of a felonious beginning to demolish the house; and that the plaintiff might be allowed to recover for the damage done to the house, but not for the value of the flour sold. 1 *East's Rep.* 615. But the value of flour spoiled, on the premises, may be recovered in such action. 1 *East's Rep.* 636.

To support an action against the hundred for a riotous demolition of a house it is not necessary to prove that twelve rioters were assembled at the time. 5 *Term Rep. K. B.* 14. And such action may be sustained by a trustee in whom the legal estate of the house is vested. *Id.*

Nearly related to this head of Riots, is the offence of *Tumultuous Petitioning*; which was carried to an enormous height in the times preceding the grand rebellion. Wherefore, by *stat. 13 Car. 2. stat. 1. c. 5.* It is enacted, That not more than twenty names shall be signed to any petition to the King, or either house of parliament, for any

alteration of matters, established by law, in church or state; unless the contents thereof be previously approved, in the country, by three justices, or the majority of the grand jury at the assises or quarter sessions; and in *London*, by the Lord mayor, aldermen, and common council; and that no petition shall be delivered by a company of more than ten persons, on pain, in either case, of incurring a penalty not exceeding 100*l.* and three months' imprisonment. See this Dictionary, titles *Petition*; *Liberty*.

Proceedings of the same nature, and manifestly tending to the same end, as the tumultuous petitions above alluded to, had arrived to such a height in the year 1795, that the legislature found it necessary to interpose by a temporary act, 36 *Geo. 3. c. 8.* for more effectually preventing seditious meetings and assemblies. But this act, after being revived by 41 *Geo. 3. c. 30.* (for a short period) was allowed to expire.

A RECORD of a RIOT ON VIEW.

BE it remembered, *That on the — day of, &c. in the — year of the reign of our Sovereign Lord George the Third, now King of Great Britain, &c. We A. B. and C. D. Esquires, two of the Justices of our said Lord the King assigned to keep the peace in the county of, &c. aforesaid, and E. F. Esquire, then sheriff of the said county, upon the complaint and humble supplication of L. B. of, &c. in the county aforesaid, in our own proper persons have come to the mansion-house of the said L. B. in the parish, &c. in the county aforesaid; and then and there do find G. H. of, &c. and J. K. and L. M. of, &c. in the county aforesaid, and other malefactors and disturbers of the peace of our said Lord the King, to us unknown, to the number of — persons, armed with swords, staves, &c. unlawfully, riotously and routously assembled at the said house, and the same house besetting, threatening great damage to the said L. B., to the disturbance of the peace of the said Lord the King, and terror of his people, against the form of the statute, &c. And therefore we the said A. B. and C. D. do then and there cause the said G. H., J. K., and L. M. to be arrested, and carried to the next gaol of our said Lord the King in the county aforesaid, by our view and record, being convicted of the unlawful assembly, riot, and rout aforesaid, there to remain every and each of them respectively, until they shall severally and respectively have paid to our said Lord the King the several sums of 10*l.* each, which we do impose upon them and every of them separately for their said offences. In witness whereof we have set our seals to this our present record, dated at, &c. aforesaid, the day and year above-mentioned.*

FORM of an INQUISITION of a RIOT.

South'ton, ss. *AN Inquisition for our Sovereign Lord the King, taken at, &c. in the county aforesaid, the — day of, &c. in the — year of the reign, &c. by the oath of A. B., C. D., E. F., G. H., &c. (the jury) honest and lawful men of the said county, before T. D. and J. B. Esquires, two justices of our said Sovereign Lord the King, assigned to keep the peace in the said county, &c. Which said jurors upon their oath aforesaid say, that J. K. of, &c. L. M., N. O., &c. and other malefactors and disturbers of the peace of our said Lord the King, to the said jurors unknown, on the — day of, &c. last past, with force and arms, that is to say, with swords, staves, &c. and other offensive weapons, unlawfully, riotously and routously did assemble to disturb*

the peace of our said Lord the King: And, so being then and there assembled, into the messuage of T. W. in the parish, &c. aforesaid, in the said county, between the hours, &c. of the same day, unlawfully, riotously and routously entered, and him the said T. W. assaulted, beat and wounded, to the great disturbance of the peace of our said Lord the King, and terror of his people; and against the form of the statute in such case made and provided.

AN INDICTMENT FOR A RIOT.

THE Jurors, &c. do present, that J. K. late of, &c. in the county of, &c. aforesaid, yeoman, L. M. late of, &c. and N. O. late of, &c. and divers other persons, (to the Jurors aforesaid yet unknown) on the — day, &c. in the — year of the reign, &c. at, &c. with force and arms, unlawfully, riotously and routously did meet, assemble and gather together, to disturb the peace of our said Lord the King; and being so assembled and met together, did then and there unlawfully, riotously and routously make an assault upon one L. B. then being in the peace of God and of our said Sovereign Lord the King; and then and there beat, wounded, and evilly treated the said L. B. and other injuries did to him, to the great damage of the said L. B. and against the peace of our said Lord the King, his crown and dignity, &c.

PROCLAMATION FOR RIOTERS to disperse.

OUR Sovereign Lord the King, chargeth and commandeth all persons being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the Act, made in the 1st year of King George, for preventing Tumults and Riotous Assemblies.

GOD SAVE THE KING!

For other forms, see *Burn's Justice*, title *Riot*.

RIPARIA, from *ripa*, a bank of a river.] A river; or water running between the banks. *Magn. Cart. c. 5: stat. Westm. 2. c. 47: 2 Inst. 478*. It has usually been translated a *Bank*, but this seems erroneous. *Aqua vocata le Lee, magna Riparia existit*, is a great river. *Rot. Parl.*

RIPIERS, *riparii*, à *fiscellâ*, quâ in devehendis piscibus utuntur, *Anglicè*, a *rip*.] Those that bring fish from the sea coast to the inner parts of the land. *Camd. Britan. 234*.

RIPPERS, *Reapers* or cutters down of corn: Hence *Riptowel* was a gratuity or reward given to customary tenants when they had reaped their lord's corn. *Cowell*.

RIVAGIUM, *rivage*, or *riverage*.] A duty paid to the King on some rivers for the passage of boats or vessels.—*Quieti sint ab omni lastagio, passagio, tallagio, rivagio, &c. Placit. temp. Ed. 1*.

RIVEARE, To have the liberty of a river for fishing and fowling. *Pat. 2 Ed. 1*.

RIVERS, By the statute of *Westm. 2. c. 47*. The King may grant commissions to persons to take care of Rivers, and the fishery therein:—The Lord Mayor of London is to have the conservation in breaches and ground overflown as far as the water ebbs and flows in the River *Thames*. *Stat. 4 Hen. 7. c. 15*.—Persons annoying the River *Thames*, making shelves there, casting dung therein, or taking away stakes, boards, timber-work, &c. off the banks, incurred a for-

seizure of *sl.* under *stat.* 27 *Hen.* 8. c. 18. Commissioners appointed to prevent exactions of the occupiers of locks, weirs, &c. upon the River *Thames* westward from the City of *London*, to *Cricklade*, in the county of *Wilts.* and for ascertaining the rates of water carriage, on the said River, &c. *stat.* 6 & 7 *W.* 3. c. 16. Which statute was revived with authority for the commissioners to make orders and constitutions, to be observed under penalties, &c. *stats.* 3 *Geo.* 2. c. 11: 24 *Geo.* 2. c. 8.

As to annoyances in Rivers, either positively by actual obstructions, or negatively, by want of reparations, the persons so obstructing, or such individuals, as are bound to repair and cleanse them, or (in default of these last) the parish at large, may be indicted, distrained to repair and amend them, and in some cases fined. 4 *Comm.* 167. See title *Nuisance*.

By *stats.* 6 *Geo.* 2. c. 37: 10 *Geo.* 2. c. 32. it is made felony, without benefit of clergy, maliciously to cut down any River or sea-bank, whereby lands may be overflowed. See title *MISCHIEF*, *Malicious*. By *stat.* 1 *Geo.* 2. st. 2. c. 19. (now expired,) To destroy the toll-houses, or any sluice or lock on any navigable River, was made felony to be punished with transportation for seven years. And by *stat.* 8 *Geo.* 2. c. 20, Destroying sluices upon Rivers, or rescuing any person in custody for the same, is made felony without benefit of clergy, and the offence may be tried as well in an adjacent county, as in that where the fact is committed. By *stat.* 4 *Geo.* 3. c. 12. Maliciously to damage or destroy any banks, sluices, or other works on such navigable River, to open the flood-gates or otherwise obstruct the navigation, is again made felony, punishable with fourteen years' transportation. Persons may justify the going of their servants or horses upon the banks of navigable Rivers, for towing of barges, &c. to whomsoever the right of the soil belongs. 1 *Ld. Raym.* 725.

The public are not entitled at Common Law to tow on the banks of antient navigable Rivers; such right must be founded either on statute or usage. 3 *Term Ref.* *K. B.* 253.—An antient towing path on the bank of a River, is not within the jurisdiction of commissioners, under the general terms of an Inclosure act. 2 *Bos. & Pul.* 296.

The owner of land through which a River runs, cannot by enlarging a channel of certain dimensions, through which the water had been used to flow, before any appropriation of it by another, divert more of it to the prejudice of any other land-owner lower down the River, who had at any time, before such enlargement, appropriated to himself the surplus water, which did not escape by the former channel. 6 *East's Ref.* 209.

RIVERS making navigable, and Canals: Divers acts of parliament pass for this purpose every session, which it would be no less tedious than useless to particularize in such a work as the present.

ROBA, A robe, coat, or garment. *Walsingh.* 267. See *Retainer*.

ROBBERY, *Robaria*.] A felonious taking away of another man's goods, from his person or in his presence, against his will, by putting him in fear, and of purpose to steal the same. *West's Symbol*, part 2. title *Indictments*. § 60. And this offence was called Robbery, either because they bereaved the true man of some of his robes or garments, or because his money or goods were taken out of some part of his garment or robe about his person. *Co.* 3 *Inst.* c. 16. This is sometimes called violent theft. *West. Symbol*, ub. *sup.*: *Kitchin. fol.*

16. 22: *Lib. ass.* 39: See *Skene de verborum signif. verb. Reif.* and *Cromp. Justice of Peace*, fol. 30.

ROBBERY is a felony by the Common Law, committed by a violent assault, upon the person of another, by putting him in fear, and taking from his person his money, or other goods of any value whatsoever. 3 *Inst.* 68. c. 16.

What is or amounts to a Robbery in respect of the Manner, or the Person from whom any thing is taken.

Open and violent larceny from the person, or Robbery, is the felonious and forcible taking, from the person of another, of goods or money to any value, by violence or putting him in fear. 1 *Hawk. P. C.* c. 34. 1st, There must be a taking, otherwise it is no Robbery. A mere attempt to rob was indeed held to be felony, so late as *Henry the Fourth's* time: 1 *Hal. P. C.* 532. But afterwards it was taken to be only a misdemeanor, and punishable with fine and imprisonment; till the statute 7 *Geo. 2. c.* 21. which makes it a felony, (transportable for seven years,) unlawfully and maliciously to assault another, with any offensive weapon or instrument;—or by menaces, or by other forcible or violent manner, to demand any money or goods; with a felonious intent to rob. If the thief, having once taken a purse, return it, still it is a Robbery; and so it is, whether the taking be strictly from the person of another, or in his presence only: As, where a Robber by menaces and violence puts a man in fear, and drives away his sheep or his cattle before his face. 1 *Hal. P. C.* 533. But if the taking be not either directly from his person, or in his presence, it is no Robbery. *Com.* 478: *Stra.* 10. 15.

2dly, It is immaterial of what value the thing taken is: a penny as well as a pound, thus forcibly extorted, makes a Robbery. 1 *Hawk. P. C. c.* 34. § 5.

Lastly, The taking must be by force, or a previous putting in fear; which makes the violation of the person more atrocious than privately stealing. This previous violence, or putting in fear, is the criterion that distinguishes Robbery from other larcenies. For if one privately steals sixpence from the person of another, and afterwards keeps it by putting him in fear, this is no Robbery, for the fear is subsequent: Neither is it capital, as privately stealing, being under the value of twelve-pence. 1 *Hal. P. C.* 534. Not that it is indeed necessary, though usual, to lay in the indictment that the Robbery was committed by putting in fear; it is sufficient, if laid to be done by violence, and against the will of him robbed. *Fost.* 128. And when it is laid to be done by putting in fear, this does not imply any great degree of terror or affright in the party robbed: It is enough that so much force, or threatening by word or gesture, be used, as might create an apprehension of danger, or induce a man to part with his property without or against his consent. Thus, if a man be knocked down without previous warning, and stripped of his property while senseless, though strictly he cannot be said to be put in fear, yet this is undoubtedly a Robbery. Or, if a person with a sword drawn begs an alms, and I give it him through mistrust and apprehension of violence, this is a felonious Robbery. 1 *Hawk. P. C. c.* 45. § 6. So if, under a pretence of sale, a man forcibly extorts money from another, neither shall this subterfuge avail him. But it is doubted, whether the forcing a higler, or other chapman, to sell his wares, and giving

him the full value of them, amounts to so heinous a crime as Robbery; 2 *Hawk. P. C. c. 34. § 7.*

This species of larceny is debarred of the benefit of clergy by *stat. 23 Hen. 8. c. 1.* and other subsequent statutes; not indeed in general, but only when committed in a dwelling-house, or in or near the King's highway. A Robbery therefore in a distant field, or foot-path, was not punished with death; 1 *Hal. P. C. 535.* but was open to the benefit of clergy, till the *stat. 3 & 4 W. & M. c. 9.*; which takes away clergy from both principals and accessaries before the fact, in Robbery, wheresoever committed. 4 *Comm. c. 17. p. 243, 4.* Principals and accessaries, before the fact, were debarred of clergy by *stat. 23 Hen. 8. c. 1.* And accessaries, after, by *stat. 4 P. & M. c. 4.* in the cases above-mentioned. The words of the *stat. 23 Hen. 8.* are still pursued in indictments for this offence. 1 *Hawk. P. C. c. 34. § 11. n.*

The circumstance of putting one in fear, makes the difference between a Robbery and a cut-purse; both take it from the person, but this takes it *clam et secretè* without assault or putting in fear, and the Robber by violent assault and putting in fear. 3 *Inst. 68. c. 16.*

Wherever a person assaults another, with such circumstances of terror as put him in fear, and causes him, by reason of such fear, to part with his money, the taking thereof is adjudged Robbery; whether there were any weapon drawn or not, or whether the person assaulted delivered his money upon the other's command, or afterwards gave it to him upon his ceasing to use force, and begging an alms; for he was put into fear by his assault, and gives him his money to get rid of him. 1 *Hawk. P. C. c. 34. § 9.*

In the case of *Macdaniel* and others, at the *Old Bailey Sessions* in *December 1755*, Mr. Justice *Foster* was of opinion, that if a man attacked by an highwayman and robbed, previous to the robbery resists, and is overpowered, without being under any fear at all, it is not the less Robbery upon that account. *Fost. 128.*

If the fact appear, upon the evidence, to have been attended with those circumstances of *violence* or terror which, in common experience, are likely to induce a man to part with his property against his consent, either for the safety of his person, or for the preservation of his character and good name, it will amount to a Robbery; and this, though no express demand of money is made. Thus if an officer feloniously take money from a prisoner, not to take him to gaol, under colour of authority: Or if one obtain property by threatening to accuse another of having been guilty of an unnatural crime, these acts, particularly the latter, on the solemn opinion of all the judges, have been held acts sufficient to raise, in the mind of the party menaced, such a *terror* and apprehension of mischief, as to constitute the offence of Robbery, by putting in fear. 1 *Hawk. P. C. c. 34. § 6. Leach's note.*

The following distinction has also been frequently admitted in prosecutions for Robbery, *viz.* That if any thing is snatched suddenly from the head, hand, or person of any one without any struggle on the part of the owner, or without any evidence of force or violence being exerted by the thief, it does not amount to Robbery. But if any thing is broken or torn in consequence of the sudden seizure, it would be evidence of such force as would constitute a Robbery: As where part of a lady's hair was torn away by snatching a diamond

pin from her head, and an ear was torn by pulling off an ear-ring, each of these cases was determined to be a Robbery. 4 *Comm. c. 17. n. 244. n. cites Leach 238.*

The words of the indictment, *violenter et felonice cepit*, must be understood to imply that there is an actual taking in deed, and a taking in Law, and that may be when a thief receives, &c. For example: If thieves rob a true man, and finding but little about him, take it, this is an actual taking; and by threats of death compel him to swear upon a book to fetch them a greater sum, which he does and delivers it to them, which they receive, this is a taking in Law by them, and adjudged Robbery; for fear made him take the oath and the oath and fear continuing, made him bring the money, which amounts to a taking in Law; and in this case there needs no special indictment, but the general indictment (*Quod violenter & felonice cepit*) is sufficient. And so it is, if at the first the true man for fear delivers his purse, &c. to the thief. 3 *Inst. 68. c. 16.*

See 1 *Hawk. P. C. c. 34. § 4.* That the thief must be in possession of the thing stolen, or otherwise he is not guilty of Robbery. 3 *Inst. 69. c. 16. S. P.*

The words of the indictment are *from the person*, &c. If the true man, seeking to escape for the safeguard of his money, casts it into a bush, which the thief perceiving, takes it: This is a taking in Law from the person, because it is done at one time. 3 *Inst. 69. c. 16.* And so, if one drive my cattle in my presence out of my pasture, or takes my hat, which fell from my head, he may be indicted as having taken things from my person. 1 *Hawk. P. C. c. 34. § 8.* See also 3 *Inst. 69. c. 16. And. 116. fol. 161: Sty. 156.*

In some cases, a man may be said to rob me, where in truth he never actually had any of my goods in his possession; as where I am robbed by several in one gang, and one of them takes my money, in which case, in judgment of Law, every one of the company shall be said to take it, in respect of that encouragement which they give to another through the hopes of mutual assistance in their enterprise: Nay, though they miss of their first intended prize, and one of them afterwards rides from the rest, and robs a third person in the same highway, without their knowledge, out of their view, and then returns to them, all are guilty of Robbery; for they came together with an intent to rob, and to assist one another in so doing. 1 *Hawk. P. C. c. 34. § 7.*

If a carrier's man or son conspire to rob him, and do it accordingly, the carrier not being privy to it, he may sue the hundred on the statute of *Winton*; but the conspiracy may be given in evidence in mitigation of damages. *Style 427.*

If a man-servant be robbed of his master's goods, in his master's sight, this shall be taken for a robbing of the master. *Style 156.*

Taking cattle from *A.* which he is driving on the highway, is a taking from his person, and so a Robbery. 2 *Salk. 651.*

As to recovering against the Hundred, see this Dictionary, title *Hue and Cry*; And as to Robberies from the person without violence and others, see title *Larceny*.—Stealing privately from the person was by 8 *Eliz. c. 4.* made felony, without clergy; but this is repealed by 48 *Geo. 3. c. 129.* and persons guilty of stealing from the person without such force or putting in fear as is sufficient to

constitute the crime of Robbery, are punishable by transportation, or imprisonment to hard labour.

ROBBERSMEN, or **ROBBERDSMEN**, Were a sort of great thieves, mentioned in the statutes 5 *Edw.* 3. c. 14: 7 *R.* 2. c. 5: of whom *Coke* says, That *Robin Hood* lived in the reign of King *Rich.* I. on the borders of *England* and *Scotland*, by robbery, burning of houses, rapine and spoil, &c. and that these Robberdsmen took name from him. 3 *Inst.* 197.

ROCHET, That linen garment which is worn by bishops, gathered at the wrists; It differs from a surplice, for that hath open sleeves hanging down; but a *Rochet* hath close sleeves. *Lindewode*, lib. 3. tit. 27.

ROCK-SALT; See *Salt*.

ROD, *Roda terra.*] A measure of sixteen feet and a half long, otherwise called a *Perch*.

ROD KNIGHTS, From the Sax. *Rad. Equitatio* & *Cnytt, Famulus, quasi Ministri Equitantes.*] Certain servitors who held their land by serving their lords on horseback. *Bract.* lib. 2. c. 35.

ROGATION-WEEK, *Dies Rogationum; Robigalia.*] A time so called, because of the special devotion of prayer and fasting then enjoined by the church for a preparative to the joyful remembrance of Christ's ascension. *Cowell*.

ROGUE, *Fr.*] An idle sturdy beggar, who, by antient statutes, for the first offence, was called a *Rogue* of the first degree, and punished by whipping, and boring through the gristle of the right ear, with a hot iron; and for the second offence, he was termed a *Rogue* of the second degree, and executed as a felon, if he were above eighteen years old; *stats.* 27 *H.* 8. c. 25: 14 *Eliz.* c. 5: but repealed by *stat.* 35 *Eliz.* c. 7. § 24: as relates to vagabonds of the second degree. See further title *Vagrants*.

ROGUS, *Lat.*] A funeral pile: A great fire wherein dead bodies were burned; and sometimes it is taken simply for a pile of wood. *Claus.* 5 *Hen.* 3.

ROLL, *Rotulus.*] A schedule of parchment that may be turned up with the hand in the form of a pipe. *Staundf. P. C.* 11. Rolls are parchments on which all the pleadings, memorials, and acts of Courts are entered and filed with the proper officer; and then they become records of the Court. 2 *Lill. Abr.* 491. By a rule made by the Court of King's Bench, every attorney is to bring in his Rolls into the office fairly engrossed by the times thereby limited, viz. The Rolls of *Trinity*, *Michaelmas* and *Hilary* terms, before the essoin day of every subsequent term; and the Rolls of *Easter* term before the first day of *Trinity* term; and no attorney at law, or any other person, shall file any Rolls, &c. but the clerks of the chief clerks of this court. *Ord. B. R. Mich.* 1705. If Rolls are not brought into the office in time, it has been ordered that they shall not be received without a particular rule of court for that purpose. *Mich.* 9 *W.* 3. See titles *Practice*; *Pleadings*.

ROLL OF COURT, *Rotulus Curie.*] The Court-roll in a manor, wherein the names, rents, and services of the tenants were copied and inrolled. See title *Copyhold*.

ROLLS OFFICE OF THE CHANCERY, An office in *Chancery Lane*, *London*, which contains Rolls and records of the High Court of Chancery, the Master whereof is the second person in the Chancery,

&c. Among these are the inrolments of acts of parliament, *&c.* See titles *Chancery*; *Master of Rolls*.

ROLLS OF THE EXCHEQUER, Are of several kinds, as the great Wardrobe Roll, the Cofferer's Roll, the subsidy Roll, *&c.* See title *Exchequer*.

ROLLS OF PARLIAMENT, The manuscript registers of the proceeding of our old Parliaments; in these Rolls are likewise a great many decisions of difficult points in law; which were frequently in former times, referred to the determination of this supreme Court by the Judges of both benches, *&c.* *Nichol. Hist. Libr. part 3. cap. 3. edit. 1714.* The inrolments of acts in chancery are sometimes termed Parliament Rolls, and sometimes Statute Rolls. See title *Statutes*.

ROLLS OF THE TEMPLE. In the two Temples is a roll called the Calves-head Roll, wherein every bencher, barrister, and student, is taxed yearly at so much to the cook and other officers of the houses, in consideration of a dinner of calves-head provided in *Easter term*. *Orig. Jurid.* 199.

ROMAN CATHOLICS. See *Papists*.

ROMA-PEDITÆ, Pilgrims that travelled to Rome on foot. *Mat. Paris, anno 1250.*

ROME, Church of, its encroachments of power here, and how suppressed. See titles *Papists*; *Pope*; *Pramunire*.

ROME-SCOT; See *Peter-Pence*.

ROMNEY-MARSH, A large tract of land in the county of *Kent*, containing 24,000 acres: and is governed by certain antient and equitable laws of sewers composed by *Henry de Bathe*, a venerable Judge in the reign of King *Henry III.*; from which laws all commissioners of sewers in *England* may receive light and direction. 4 *Inst.* 276. King *Henry III.* granted a charter to *Romney-Marsh*, empowering twenty-four men thereunto chosen, to make distresses equally upon all those who have lands and tenements in the said Marsh, to repair the walls, and water-gates of the same against the dangers of the sea. There are also several laws and customs observed in the said Marsh, established by ordinance of justices thereto appointed in 42 *Hen.* 3: 16 *E.* 1: 33 *E.* 3. *&c.* The commissioners of sewers, in other parts of *England*, may act according to the laws and customs of *Romney-Marsh*, or otherwise at their own discretion. See title *Sewers*.

ROOD, or Holy Rood, Holy Cross.

ROOD OF LAND, *Rodata Terra.*] The fourth part of an acre.

ROOTS, Trees, shrubs, or plants. See this dict. title MISCHIEF, *Malicious*.

ROPE-DANCERS, *&c.* are public nuisances, and may, upon indictment be suppressed and fined. 1 *Hawk. P. C.* 75. § 6. See title *Play Houses*.

ROS, A kind of rushes, which some tenants were obliged, by their tenures, to furnish their lords withal. *Brady*.

ROSE-TILE, Tile to lay upon the ridge of a house; is mentioned in the statute 17 *Edw.* 4. c. 4.

ROSETUM, A low watery place of reeds and rushes; and hence the covering of houses with a thatch made of reeds, was so called. *Cartular. Glaston. MSS.* 107.

ROSLAND, *Brit. Rhos.*] Heathy land, or ground full of ling; also watery and moorish land. 1 *Inst.* 5.

ROTHER-BEASTS. Under this name are comprehended oxen,

cows, steers, heifers, and such like horned beasts. See *stat. 21 Jac. c. 18*.

ROTULUS WINTONIÆ, Was an exact survey of all *England*, per *Comitatus*, *Centurias* & *Decurias*, made by King *Alfred*, not unlike that of *Domesday*; and it was so called, for that it was of old kept at *Winchester* among other records of the kingdom; but this roll time hath consumed. *Ingulph. Hist.* 516.

ROUT, Fr. *Route*, i. e. a company or number.] In a legal sense, signifies an assembly of persons, going forcibly to commit an unlawful act, though they do not do it. *West. Symb. Jar.* 2. A rout is the same which the *Germans* call *Rot*, meaning a band or great company of men gathered together, and going to execute, or indeed, executing any riot or unlawful act. See title *Riot*.

ROYAL ASSENT, *Regius assensus*.] That Assent which the King gives to a thing formerly done by others, as to the election of a bishop by dean and chapter; which given, then he sends a special writ for the taking of fealty. See *F. N. B. fol.* 170. When the royal Assent is given to an act of parliament, it is indorsed in the proper terms upon the act. See title *Parliament*, 7.

ROYAL BOROUGHS. Incorporations in *Scotland* created by Royal Charter giving jurisdiction to the magistrates within certain bounds, and vesting certain privileges in the inhabitants and burghesses. A borough is called a Royal Borough, if it holds of His Majesty: if it holds of a subject it is termed a Borough of Barony. *Bell's Scotch Dictionary*.

ROYAL FAMILY. See titles *King*; *Queen*; *Prince*.

ROYALTIES, *Regalitates*.] See title *King*. Those Royalties which concern government in an high degree, the King may not grant or dispose of. *Jenk. Cent.* 79.

ROYNESS. Streams, currents or other usual passages of rivers and running waters. *Cowell*.

ROZIN, Is among the numerous articles, the importation of which is regulated by the *Navigation Acts*. See that title.

RUBRICAS, à *rubro Colore*, because antiently written in red letters.] Constitutions of the church, founded upon the statutes of uniformity and public prayer, viz. *statutes 5 & 6 Ed. 6. c. 1: 1 Eliz. c. 2: 13 & 14 Car. 2. c. 4*. See titles *Nonconformists*; *Religion*, &c.

RUBRIC of a statute is its title, which was antiently writ in red letters. It may serve to shew the object of the legislature, and thence afford the means of interpreting the body of the act. Hence the phrase of an argument, à *rubro ad nigrum*.

RUDMAS-DAY, From the Sax. *Rode*, *Crux*, and *mass-day*.] The feast of the Holy Cross: there are two of these feasts, one on the 3d of *May*, the invention of the cross, and the other the 14th of *September*, called Holy Rood-day, the exaltation of the cross.

RULE OF COURT; an order made either between parties to a suit on motion: Or to regulate the practice of the court. See titles *Motion in Court*; *Practice*.

Rule of Court is also granted to prisoners in the King's Bench or Fleet prisons, every day the Court sits, to go at large, if such prisoner have business in law of his own to follow. By rule of Court of *K. B. Easter term*, 30 *Geo. 3.* on this subject, no prisoner within the King's Bench prison, or the Rules thereof, shall have day rules

above three days in each term; when they are to return within the walls or rules before nine o'clock in the evening. 3 *Term Rep.* 584.

The rules of the King's Bench Prison, are certain limits without the walls, within which prisoners in custody are allowed to live, on giving security to the marshal, not to escape. The benefit of these Rules may be had by one in custody in an *excom. cap.* but is never granted to a prisoner in execution on a criminal account, or for a contempt. See *Rule Easter*, 30 *Geo.* 3. 3 *Term Rep.* 383: *Tidd's Pract. K. B.*

RUMNEY-MARSH; See *Romney-Marsh*.

RUMOURS, Spreading. See title *False News*.

RUNCARIA, from *Runca*.] Land full of brambles and briars. 1 *Inst.* 5, a.

RUNCILUS, RUNCINUS; is used in *Domesday* (says *Shelman*) for a load-horse, *Equus operarius colonicus*; or a sumpter-horse, and sometimes for a cart-horse, which *Chaucer*, in the *Seaman's Tale*, calls a *Rowney*. *Cowell*.

RUNDLET; RUNLET; a measure of wine, oil, &c. containing eighteen gallons and a half. *Stat.* 1 *R.* 3. c. 13.

RUNNERS OF FOREIGN GOODS; See titles *Customs on Merchandise*; *Smuggling*.

RUNRIG-LANDS, in *Scotland*, Lands where the ridges of a field belong alternately to different proprietors. Antiently this kind of possession was advantageous in giving an united interest to tenants to resist inroads. By the act 1695, c. 23. a division of these Lands was authorised; with the exception of Lands belonging to Corporations.

RUPTARII, Soldiers, or rather robbers, called also *Ruttarii*; and *Rutta* was a company of robbers: Hence we derive the word rout and bankrupt. *Mat. Paris*, anno 1250. *Articuli Magne Carte Johannis*.

RUPTURA, Arable land or ground broke up; A word used in antient charters.

RURAL DEANS; See title *Dean*.

RURAL DEANERY. As every diocese is divided into archdeaconries (of which there are sixty) so each archdeaconry is divided into Rural Deaneries, which are the circuit of the Archdeacon's and Rural Dean's jurisdiction: And every Deanery is divided into parishes. 1 *Comm.* 111.

RUSCA, A tub or barrel of butter, which in *Ireland* is called a *Ruskin*: *Rusca apum* signifies a hive of bees. *Mon. Ang.* ii. 986.

RUSCATIA, The place where kneeholm or broom grows. *Cæ. Litt.* 5.

RUSH-LIGHTS; See *Candles*.

RUSSIA COMPANY, (or as it has sometimes been termed *The Muscovy Company*,) subsisted by virtue of a charter granted by *Philip* and *Mary*, in the first and second year of their reign, which was confirmed by a private statute, passed in the 8th of *Elizabeth*. The charter was granted to them under the style of *The Merchants Adventurers of England for the Discovery of Lands, Territories, Isles, Dominions, and Seigniories unknown, and not, before their late Adventure or Enterprize, by Seas or Navigation commonly frequented*. In the statute they were described by the name of *The Fellowship of English Merchants for the Discovery of new Trades*. The extent of their rights under the statute was the sole privilege of trading to and from the dominions and territories of the Emperor of *Russia*, lying north-

ward, north-eastward, and north-westward from *Londôn*, as also to the countries of *Armenia Major*, or *Minor*, *Media*, *Arcania*, *Persia*, or the *Caspian Sea*. It was said in *stat. 10 & 11 W. 3. c. 6.* to be commonly called *The Russian Company*.

In the reign of King *Will. III.* it was thought this trade might be considerably enlarged, if the admission of persons into the Company was made more easy; and that it would be very proper to ascertain the fee of admission, which had not been done either by the charter or the statute [of *Elizabeth.*] It was accordingly enacted by the said statute of *10 & 11 W. III. c. 6. § 1, 2.* that every subject of this realm might be admitted into the Company on payment of *5*l.** only.

For the charter and other matters relating to this Company, see *Hackluyt*, vol. 1. *ff.* 258—274. And for the particulars of *stat. 14 Geo. 2. c. 36.* as to the trade to *Persia*, through *Russia*, see *Reeves's Law of Shipping and Navigation*.

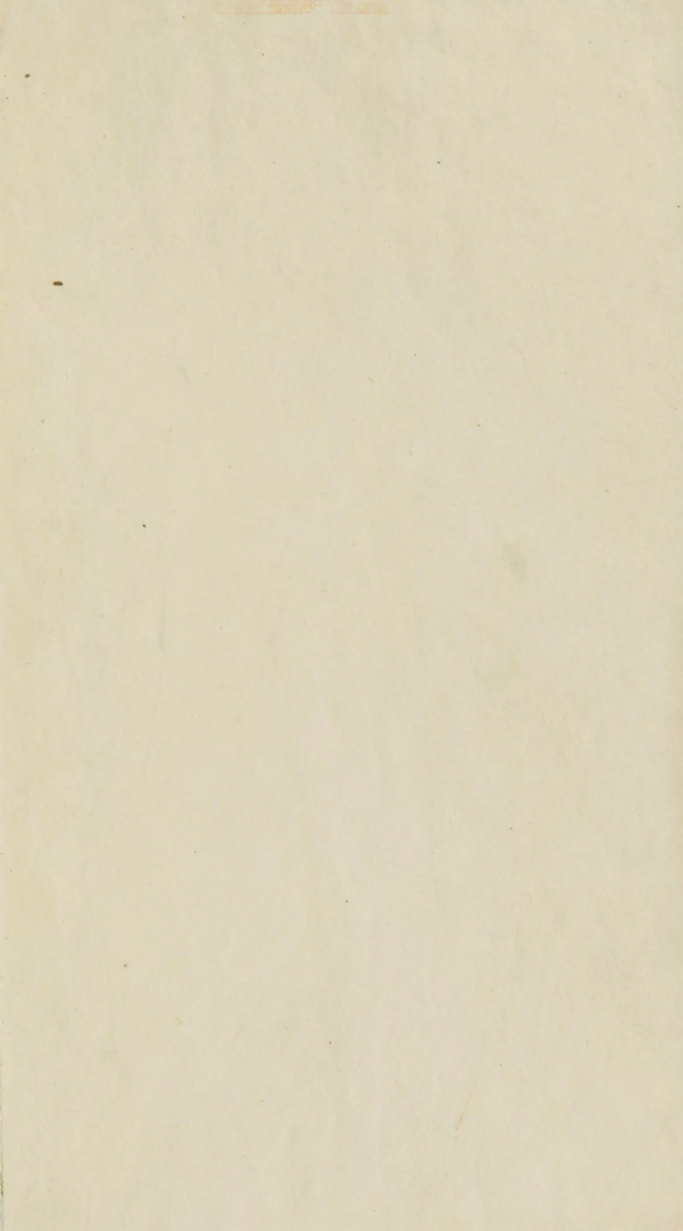
RUSTICI. The churls, clowns, or inferior country tenants, who held cottages and lands by the services of ploughing, and other labours of agriculture for the lord. The land of such ignoble tenure was called by the Saxons *Gafalloid*, as afterwards *socage tenure*, and was sometimes distinguished by the name of *terra rusticorum*. *Paroch. Antiq.* 136. See title *Tenures*.

RUTTARII. See *Ruſtarii*.

RYE, A grain, of which bread is made in some parts of *England*. See title *Corn*.

RYE AND WINCHELSEA, An antient statute was made against ballast cast into the channel at *Rye* and *Winchelsea*, &c. *Stat. 2 Ed. 6. c. 30.* See title *Cinque Ports*.

END OF VOLUME FIFTH.





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